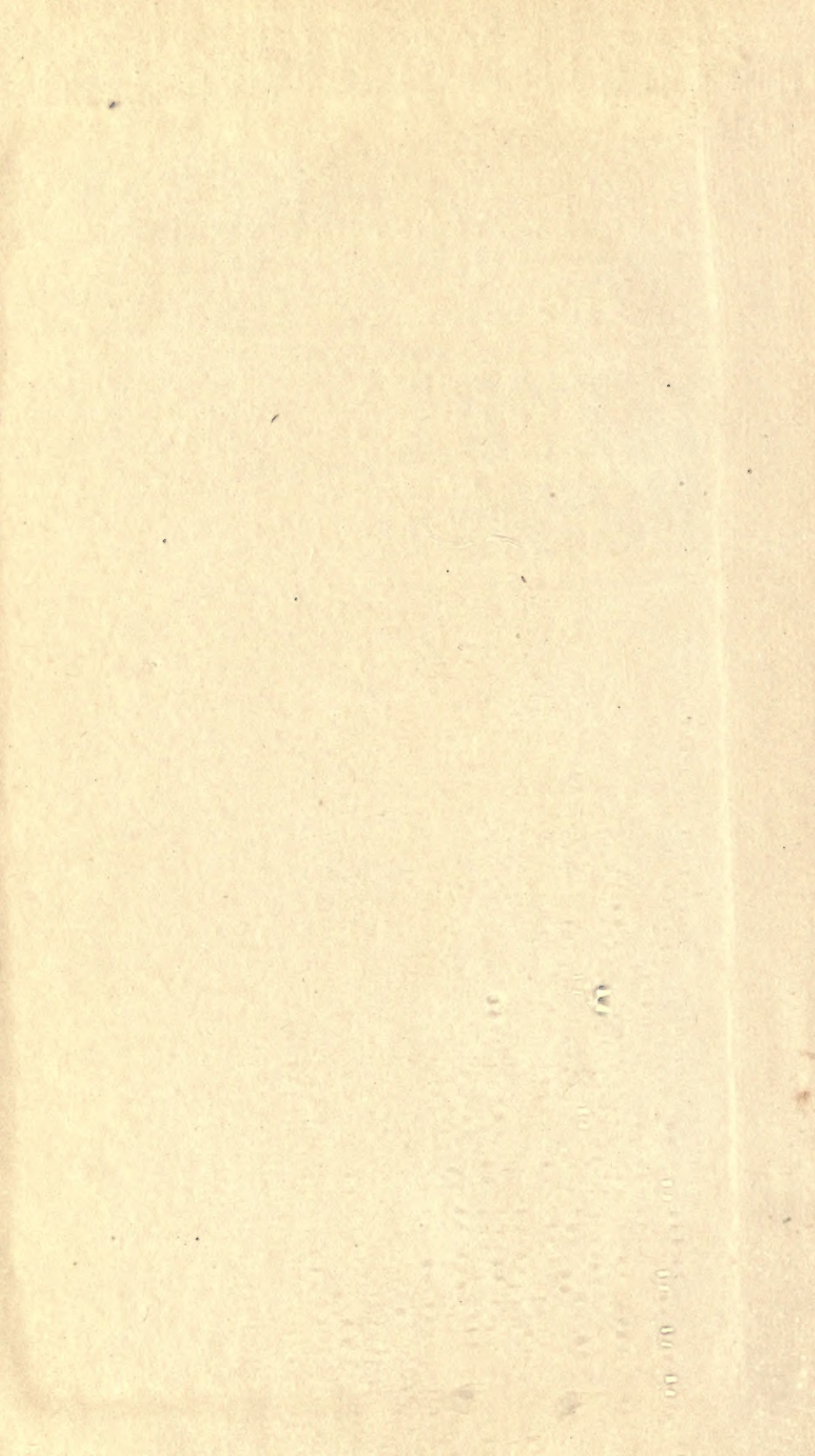
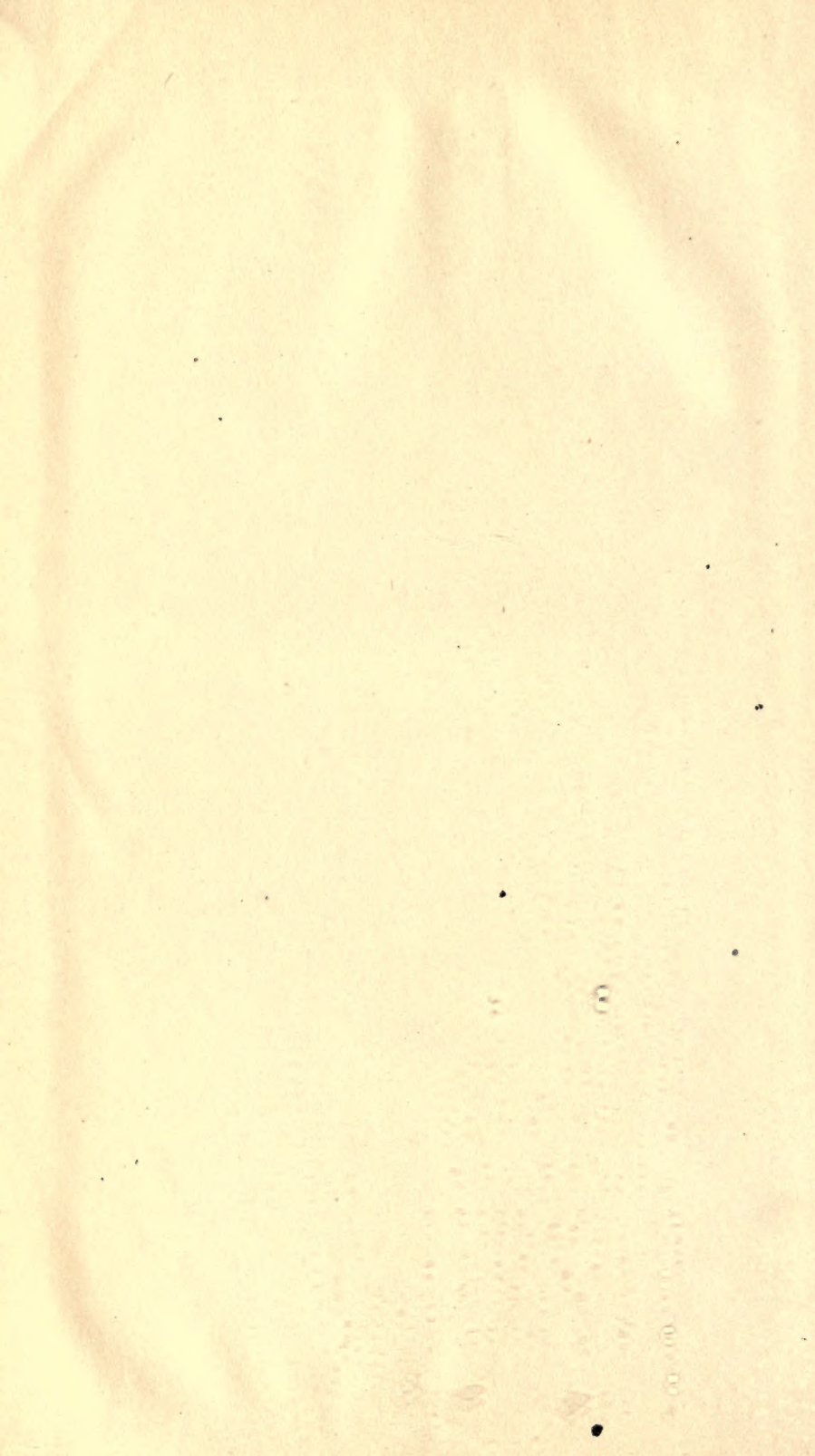










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New York (State) Reports.

REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
NEW-YORK REPORTS ISSUED DURING THE PERIOD
COVERED BY THIS VOLUME.

BY

AUSTIN ABBOTT,

COUNSELOR AT LAW.

NEW SERIES.

VOL. XVI.

NEW-YORK:
DIOSSY & COMPANY.

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ABBOTT'S
PRACTICE REPORTS.
NEW-YORK.

NEW SERIES.

TROXELL *against* HAYNES.

New York Common Pleas ; General Term, June, 1874.

JUDGMENT FOR INJUNCTION.—DAMAGES.

The general costs of an action are not part of the damages to be awarded on the undertaking given on issuing an injunction, and therefore their payment is not to be deducted from such damages.

The case of *Andrews v. Glenville Woolen Co.*, 50 N. Y., 287,—explained and qualified.

Judgment can not be given against the sureties without action.

William L. Troxell sued John C. Haynes, William B. Fiske, Richard N. Wenman, Frank J. Tinkham, and William H. Donaldson, and on the commencement of this action an *ex-parte* injunction was granted upon an undertaking in the usual form.

On motion of the defendants this injunction was dissolved as to all of the defendants except Haynes.

At the trial, on the merits, the complaint was dismissed as to all defendants, and subsequently judgment was entered dissolving the injunction as to all of

Troxell v. Haynes.

the defendants, with three hundred and forty-seven dollars and ninety-four cents costs and allowance.

An order was subsequently made, appointing a referee, to ascertain the damages sustained by the defendants, or either of them, by reason of the injunction, who, after hearing proofs, reported : " That at the commencement of the action the plaintiff obtained an injunction against defendants, at which time an undertaking was duly executed by Troxell and Rieker, and which was filed with the clerk of this court.

" That on March 4, an order was entered, on motion of defendants, vacating said injunction as to all the defendants except Haynes. That the defendants incurred and necessarily expended in obtaining such order, expenses, and counsel fees amounting to five hundred dollars.

" That this court did finally decide on the trial of this action that plaintiff was not entitled to said injunction. That defendants necessarily incurred or expended in preparation for and upon trial of said action for expenses and counsel fees the further sum of three hundred and fifty dollars.

" That plaintiff has paid defendants three hundred and forty-seven dollars and ninety-four cents, the allowance and costs taxed in action."

And finding and reporting as matter of law that the defendants Fiske, Wenman, Tinkham, and Donaldson are entitled to recover from the obligors in said undertaking named the sum of four hundred dollars as damages sustained by reason of the injunction, and assessing the damages of *these four* defendants at four hundred dollars, and finding that Haynes is not entitled to recover anything on said undertaking.

Said report was duly filed, and a motion made by defendants to confirm it, and for judgment to be ordered in favor of Fiske, Wenman, Tinkham, and Donaldson, against Troxell and Reiker (plaintiff and his surety) for

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four hundred dollars, together with the costs and disbursements of the reference to be taxed by the clerk of this court, and for an allowance of five per cent. on the recovery, four hundred dollars in addition to trial fee and costs of motion to confirm.

DALY, Ch. J.—There was no authority to enter up a judgment upon the referee's report of the damages which the defendants had sustained by reason of the injunction; nor, when the referee's report is confirmed, is there anything in section 222 of the Code authorizing the entry of a judgment for the amount against the sureties. The liability of the sureties in this undertaking is to pay such damages, not exceeding five hundred dollars, as the defendants may sustain by reason of the injunction, such damages to be ascertained by a reference, or otherwise, as the court may direct. The sureties, by their undertaking, have stipulated for a mode in which it shall be ascertained whether they are liable or not to pay any amount, and until the court has, by reference or otherwise, ascertained this, their liability is not established or fixed. The obligation is to pay such damages as the defendants may sustain by reason of the injunction. Money expended for the employment of counsel to obtain a dissolution of the injunction and to defend the suit brought to restrain the defendants by injunction, comes under this head. It is a direct expense incurred by the defendants in consequence of the injunction, and if actually paid out by him, should be allowed (*Corcoran v. Judson*, 24 *N. Y.*, 106; *Coates v. Coates*, 1 *Duer*, 664). An allowance was made to the defendants, under the Code, after the complaint was dismissed, of two hundred and fifty dollars. This, in the language of the Code, "is a certain sum allowed to the prevailing party by way of indemnity for his expenses in the action." This amount has been paid to the defendants, and is a part of the ex-

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penses which they have incurred. I do not mean to say that this is all that can be allowed them upon the assessment of the damages, sustained by reason of the injunction, for the expense they may have been put to in the employment of counsel. It may be that they have had to expend much more, and when it appears that they have in good faith done so in consequence of the difficulty and large amount of labor that became necessary in the defense of the action, their additional expenditure for legal aid should, within reasonable limits, be allowed in the assessment of the damages (*Bauler v. Roberts*, 3 *Robt.*, 226; *Ricard v. Heriot*, 5 *La.*, 245; *Wilcox v. Bundy*, 13 *Id.*, 381; *Pargout v. Morgan*, 2 *Id.*, 101). What I mean to say is, that the allowance given by the Code is a repayment of a part of the expenses incurred, and is to be taken into account in the assessment of the damages, which was not done in this case. If the defendants paid out four hundred dollars for legal services, then three hundred and twenty-five dollars of that amount has already been received by them, and the amount to be assessed would be seventy-five dollars, and not, as the referee has reported, four hundred dollars, in addition to the three hundred and twenty-five dollars. The confirmation of the report having been opened, the question is not now before me whether the defendants, upon the confirmation of the report, may enter up judgment against the sureties upon the report, but as the question has been discussed upon this motion, and as it will necessarily ensue upon the confirmation of the report, I may state that it is my impression that they can not. The Code makes no provision for it. It authorizes the assessment of damages which the defendants have sustained, the undertaking having provided that it shall be ascertained in that or such other mode as the court may direct. The sureties are not necessarily parties to that proceeding, and the assessment may be made without notice to them

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(Methodist Church v. Barker, 18 N. Y., 465), and when the report is confirmed it is conclusive upon them as to the extent of the damages, but there is, for all I know, no way in which, beyond this, the sureties can be charged, except by an action upon the undertaking. Independent of the question of the amount of damages which the defendants have sustained by the injunction, they may have a defense. Cases have occurred in which the names of parties have been fraudulently signed to analogous instruments, and in which individuals have personated them in acknowledging the instrument before notaries or commissioners, and there may be other defenses. In *Merryfield v. Jones*, 2 *Curtis C. Ct.*, 306; *Bein v. Heath*, 12 *How. U. S.*, 168, it was held that a court of equity can not order the sureties upon an injunction bond to pay the damages sustained by reason of the injunction, that the defendant must resort to his action upon the bond; and I suppose that the same course must be pursued here (*Patterson v. Bloomer*, 37 *How. Pr.*, 450; *Wilde v. Joel*, 15 *Id.*, 321).

An order was subsequently entered deducting from the four hundred dollars reported as the damages sustained by defendants, Fiske, Wenman, Tinkham, and Donaldson, three hundred and twenty-five dollars, being the amount of the taxed costs of the action, which had been paid by plaintiff as part of the three hundred and forty-seven dollars and ninety-four cents, awarded to all the defendants in the action, and confirming the report for seventy-five dollars damages together with the one hundred and one dollars paid for referee's fees on reference, one hundred and seventy-six dollars altogether, and denying motion for allowance, trial fee, and costs of motion to confirm for want of power to grant same in this proceeding, also denying motion to order judgment in favor of defendants Fiske, .

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Wenman, Tinkham, and Donaldson, against Troxell and Reiker for like want of power, but giving the defendants Fiske, Wenman, Tinkham, and Donaldson leave to sue on the undertaking for the sum of one hundred and seventy-six dollars, the amount of damages as settled, allowed, and confirmed as the damages of these four defendants.

From this order the defendants appealed.

Samuel H. Randall, for the appellants.

Barrett, Redfield, and Hill, for the respondents.

BY THE COURT.—ROBINSON, J.—The object of this action was to enjoin the defendants in the use of an unpatented secret of trade, and this proceeding brings in review, on appeal, a decision made upon the right of the defendants to enforce an undertaking in the sum of five hundred dollars given on the granting of a preliminary injunction. There were five defendants, and, on the hearing upon the return of the order to show cause why the injunction should not be continued, that preliminary injunction was dissolved as to four of the defendants, and retained as to the defendant Haynes. An expense of five hundred dollars was incurred by all of the defendants for counsel fees on that occasion; but, by reason of the retention of the injunction against Haynes, the damages of defendants on that motion have, upon a reference had under section 222 of the Code, been assessed at four hundred dollars. Upon a subsequent trial on the merits, the complaint was dismissed as to all the defendants, and they recovered for costs three hundred and forty-seven dollars and ninety-four cents, which included an extra allowance of two hundred and fifty dollars. These costs have been paid, and the defendant and his sureties claim, and the judge from whose decision this appeal was taken has decided,

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that such costs and allowance were to be deducted from the four hundred dollars assessed as defendant's damages under the undertaking. As to the defendant Haynes, the motion to dissolve the injunction was denied, and it was continued until final judgment. Under these circumstances the respondent claims that such trial was necessary to determine the right to the preliminary injunction as to him, and that the taxed costs, including such extra allowance awarded the defendants "in a difficult or extraordinary case after defense interposed or trial had" (*Code*, § 309), were an indemnity to defendants (*Code*, 303); that was to be considered *pro tanto* as an allowance for "damages sustained by reason of the injunction." No proof was offered or finding made by the referee that such extra allowance was in any way awarded in consideration of any services of counsel on the trial, or upon any employment or effort, having special reference to the removal of the injunction; nor do I find any warrant in any of the authorities cited for holding that the general taxable costs accruing in the action, including the extra allowance, and awarded by way of "indemnity for the expenses of the action" (*Code*, § 303), should be applicable or considered with reference to such special damages as were occasioned by the issuing of the injunction.

The language of the courts is uniformly to the contrary, and that none of the general costs of this action constitute any part of such damages (*Coates v. Coates*, 1 *Duer*, 644; *Childs v. Lyons*, 3 *Robt.*, 704; *Strong v. De Forest*, 15 *Abb. Pr.*, 427; *Town of Guilford v. Cornell*, 4 *Id.*, 220; *Hovey v. Rubber Tip Co.*, 50 *N. Y.*, 335; *Disbrow v. Garcia*, 52 *N. Y.*, 654). The case of *Andrews v. Glenville Woolen Co.*, 50 *N. Y.*, 287, is an exceptional one where the original motion to dissolve the injunction "was not denied on the merits, nor for irregularity in making the motion, but because the

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court, in its discretion, thought it more advisable to defer the inquiry into the merits until the final hearing." In the present case it in no way appears that the continuance of the injunction, as against Haynes, was ordered upon any such exceptional grounds, nor that the hearing on the merits was at all deferred, or the motion decided otherwise than on the merits as they were then made to appear to the judge. The subsequent trial was then, as well to him as to the other defendants, an ordinary trial necessary for the disposal of the merits of the controversy. In such case, no counsel fees or costs of the trial are allowable as damages sustained by reason of the injunction, as is held in *Hovey v. Rubber Tip Pencil Co.*; *Disbrow v. Garcia*, and other cases above cited.

I am, therefore, of the opinion that the allowance by the judge of the taxable costs and extra allowance made on the final judgment, and already paid, as part of the damages contemplated by the provisions of the undertaking was error, and that the damages reported by the referee are not to be in any respect, for any of the causes stated, diminished or reduced.

The order should in this respect be reversed, and an order made confirming the referee's report; but I concur in the judge's opinion that no final judgment should be entered upon the report, but leave should be given to prosecute the undertaking.

LARREMORE, J., concurred.

Matter of Alexander's Will.

16 266 affirmed
 ny. 346 n.s. 383

MATTER OF ALEXANDER'S WILL.

*Before the Surrogate of the County of Albany;
 May, 1874.*

LETTERS TESTAMENTARY.—APPOINTMENT OF EXECUTOR.

A testator may delegate to a person designated in the will, the power to name an executor.*

The provision of 2 *R. S.*, 69, § 1,—to the effect that the surrogate shall issue letters to the persons “named” in the will, as executors,—does not preclude him from issuing letters to one not expressly named in the will, but duly designated by virtue of such a power.

Motion to revoke letters.

Andrew Alexander died on June 13, 1873, leaving a last will and testament which contained the following clause:

* The doctrine of implied appointment is well recognized. *Bayeaux v. Bayeaux*, 8 *Paige*, 333; *Ex parte McDonnell*, 2 *Bradf.*, 32; *Exp. McCormick*, *Id.*, 169.

The following form of power for appointment in case of vacancy in the number of trustees under the will has been used in Pennsylvania.

“In case of the death or resignation of either of my executors and trustees, it is my desire that the survivors of them shall, with the approval of a majority of the *cestuis que trust* herein named, as shall then be of full age, by any writing to be acknowledged and recorded in the office for recording deeds, &c., for appoint a trustee in the place of each of them, who may so resign or die, and such new trustee or trustees so appointed shall have and possess the same and like powers in every respect as those herein appointed, or as if such persons had been herein appointed trustees, and shall possess the same and like powers of appointing other trustees as have those herein appointed.”

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"I hereby nominate and appoint my said wife the executrix of this my will, hereby revoking all former wills by me made, and request that such male friend as she may desire shall be appointed with her as co-executor."

Letters testamentary were duly issued to Mary E. Alexander, his widow, and afterwards on or about March 2, 1874, upon her petition, Stephen S. Wandell was associated with her as co-executor in pursuance of the above clause of said will, and letters testamentary granted to him. A motion was now made before Surrogate ROGERS, by Daniel Hartnett, a creditor of the estate, to revoke the letters testamentary of said Wandell as unauthorized by law.

R. H. McClellan, for the motion.

E. L. Fursman, for the executor.

The SURROGATE.—There can be no question that by the ecclesiastical law of England, from which our law respecting the testamentary disposition of property is derived, a testator may delegate to a person named in the will the power of naming an executor. This is well settled by authority, and was not denied upon the argument (Matter of Cringan, 1 *Hagg. Ecc.*, 548; Matter of Ryder, 2 *Swabey & Tristram*, 127; *Jackson v. Paulet*, 2 *Robertson Ecc.*, 344).

But the counsel for the petitioner contends that the rule upon this subject has been changed by the *Revised Statutes* of this State, and relies principally upon the case of the Estate of Bronson (1 *Tuck. Surr.*, 464). I have carefully examined the reasoning of the surrogate, in the case last cited, and find myself unable to concur with him in the conclusion to which he arrives. It is claimed that the surrogate has no power to issue these letters to Wandell, because the statute provides as fol-

Matter of Alexander's Will.

lows: "When any will of personal estate shall have been duly admitted to probate, the surrogate who took such proof shall issue letters testamentary thereon to the persons named therein as executors" (2 R. S., 69, § 1). This clause of the statute, the counsel contends, and Surrogate TUCKER decides, virtually prohibits the surrogate from issuing letters to any person who is not actually mentioned in the will *by name*. This is put upon the ground that the executors no longer derive their authority from the will, but from their appointment by the surrogate, who is an officer of limited jurisdiction, and whose powers can not be enlarged by construction. This is altogether too narrow a construction of the statute. In my judgment, the executor is not "appointed" by the surrogate, nor does he derive his powers from that officer, or from the statute. It is just as true now as it was before the statute that the executor derives his authority from the will of the testator. The statute regulates the manner in which that will shall be carried into effect, and prohibits the executor from acting until the will has been admitted to probate, and the executor, so to speak, has been judicially certified to be the person designated by the testator.

Dayton, in his work on Surrogates, (3rd ed., p. 212, &c.), quoting from *Williams on Executors*, thus speaks of letters testamentary, and the source whence comes the authority of executors: "Letters testamentary, have been granted and issued apparently as the credentials of the executor's authority to administer the goods, &c., of the testator and to execute his will." And, again (p. 213): "Letters testamentary are merely operative as the authenticated evidence and not at all as the foundation of the executor's title, for *he derives all his interest from the will itself*, and the property vests in him from the moment of the testator's death."

The duty of the surrogate to carry out the provisions

Matter of Alexander's Will.

of the will is not a power of "appointment," nor can the right of the testator to designate, in his own way, a person to execute the provisions of his will be limited, because the surrogate does not hold a court of general jurisdiction. It is possible to construe a statute with such strict adherence to its letter as to defeat its plain meaning. If the statute be construed according to its very letter, the name of the person would not only have to appear in the will, but he must be explicitly called *executor*, and yet there is no rule better settled than that the testator need not designate the appointee by that particular name. "Any language whereby the testator, in his will, indicates the desire that any person should discharge the duties pertaining to that office will be sufficient for the purpose" (2 *Redfield on Wills*, 62, marg. paging, and cases cited). But it is clear that if the above clause of the statute is to receive the literal construction contended for, this rule, well settled for years, not now disputed, and reasonable in itself, will be abrogated. It is plain that the object of the statute was not to enlarge, restrict, or in any manner modify the right of a testator to designate an executor as he could at common law. The statute does not provide for the appointment of executors by testators, but simply declares the duties of the surrogate with reference to executors already appointed. It does not prescribe the mode of appointment, it leaves that to be governed by the rules of the common law. The surrogate has no power of selection. He is to look to the will for the appointment, and if the designation is reasonably certain, and no rule of law has been violated, he must issue letters in accordance with the testator's desire as expressed in the will. The statute is made for the direction of the surrogate alone, and the words, "named in the will," have the same meaning as "designated in the will," or "provided for by the will," and have no reference whatever to the particular man-

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ner in which the intention of the testator is to be expressed. For the foregoing reasons the prayer of the petitioner must be denied.

distinguished
63 N.Y. 317. Follow
18 Abb. N.Y. 247, 248.
2 Apr 665.

EVANS against KALBFLEISCH.

*New York Superior Court; General Term, November,
1873.*

CAUSE OF ACTION.—PLEADING.—COMPLAINT.—REFERENCE.

In an action to recover for services rendered, if the complaint alleges a special contract to pay a specified amount for services to be rendered, and the rendering of services reasonably worth that sum, it is to be deemed as stating a single cause of action, namely, an action upon a special contract.*

Such an action can not be referred on the ground that it involves the examination of a long account.

The rule must now be deemed settled, that the court have not power to refer the trial of an action, where any issue raised upon the complaint is such that the objecting party has the right to its trial by jury. All the causes of action stated in the complaint must be referable.†

The power of the court to refer even actions arising on contract, is restricted to cases where the court can see from the proofs before it, that the examination of a long account will be required.

Appeal from an order directing a reference.

* See *Marsh v. Holbrook*, 3 *Abb. Ct. App. Dec.*, 176.

† Issues raised upon new matter in the answer do not affect the question. *Welsh v. Darragh*, 52 *N. Y.*, 590.

Evans v. Kalbfleisch.

Charles D. Evans sued Charles H. Kalbfleisch and others, executors.

The complaint alleged that the plaintiff was employed and retained by the defendants' testator to render, and that he did render, services for such testator, as his attorney and counsel, and in preparing and procuring testimony in a suit expected to be brought, and which afterwards was brought, against such testator. It further alleges, "that the price agreed upon to be paid this plaintiff by said Kalbfleisch, for said services so to be rendered, was the sum of five thousand dollars, and he, said Kalbfleisch, to pay all incidental disbursements."

Then follows a particular statement of the services performed, and concludes: "And that the said services so rendered said Kalbfleisch were reasonably and fairly worth the sum of five thousand dollars." No claim is made for any "incidental disbursements."

The defendants admitted the performance of some services, but alleged that the charges made therefor were excessive. They denied the alleged agreement, and averred payment in full by the testator in his lifetime.

Upon the pleadings and a mere affidavit "that the trial would involve the examination of some fifty items of account," the court ordered a reference to hear and determine the issues, against the objection of the defendants.

The defendants appealed.

Mr. Edgar M. Cullen, for appellants.

Mr. Charles S. Gage, for respondent.

BY THE COURT.*—MONELL, J.—I am satisfied there

*Before BARBOUR, Ch. J., MONELL and FREEDMAN, JJ.

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is but one cause of action alleged in the complaint, namely, an agreement to pay five thousand dollars. After alleging the employment, and performance of the services, it is averred that the price "*agreed upon*" by the defendant's testator, for such services, "*so to be rendered,*" was the sum of five thousand dollars. The subsequent allegation, that the services so rendered were reasonably worth the sum of five thousand dollars, is not a statement of another and different causes of action.

A plaintiff may unite a cause of action upon a special contract, with a cause of action arising upon what was formerly denominated a *quantum meruit*. But they must be separately stated (*Code*, § 167), and must each contain a statement of facts sufficient to constitute the alleged separate cause of action.

In the complaint in this action, there is no such compliance with the provision of law referred to. The alleged *quantum meruit* is but a mere continuation of the preceding averment appertaining to the special contract, and is not in any proper sense the allegation of a separate and different cause of action. Taken by itself, as it must be, it does not contain facts sufficient to constitute a cause of action ; and it must, therefore, to be available at all, have relation to the preceding matter.

This, I think, is the correct construction of the pleading. It contains a statement of facts constituting a cause of action arising upon a special contract, and not of facts sufficient to constitute any other or different cause of action.

Such an action the court has not the power to refer. The trial would not require the examination of a long account. Proof of the special contract would authorize a recovery, although proof of performance by the plaintiff of the services rendered might be necessary. In this view the order of reference was improperly granted.

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But assuming, as it was doubtless assumed by the learned judge at special term, that the complaint contains a statement of facts sufficient to constitute a cause of action upon a *quantum meruit*, as well as upon the special contract, is the case then referable?

Recent adjudications by the court of last resort have very much disturbed, if they have not reversed, many decisions, of this and other courts, sustaining the power of the court to make compulsory references in certain cases. In *Whitaker v. Desfosse* (7 *Bosw.*, 678), this court held, that if *any* of the issues required the examination of a long account, the action was referable. The same view was substantially held in *Goodyear v. Brooks* (2 *Abb. Pr. N. S.*, 296; *S. C.*, 4 *Robt.* 682), and was affirmed in *Batchelor v. The Albany City Ins. Co.* (6 *Abb. Pr. N. S.*, 240; *S. C.*, 1 *Sweeny*, 346), where the cases are carefully collected and reviewed.

The principle affirmed in those cases was to the effect, that if any one of the issues made by the complaint or answer would, standing by itself, have been referable, then the court had power to refer all the issues, in other words, refer the whole action, notwithstanding some of the other issues would not, standing by themselves, have been referable.

But in the recent case of *Townsend v. Hendricks* (40 *How. Pr.*, 143), the court of appeals have affirmed, I think, a different rule; and have denied, in effect the power of the court to refer any action, where any of the issues were such, that the party had the right of trial by a jury. In that case, the complaint alleged a cause of action in *tort*, and the defense was, in part, a counter-claim, which, by itself, would have been referable. But the court held that a party could not be deprived of the right of trial by jury in any of the cases where such right is preserved by the constitution.

The action in that case was not upon *contract*, but

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was for a tort ; and the court recognizing it as among those in which a "trial by jury has been heretofore used," has declared that the court could not refer it, notwithstanding the counter-claim, which was legitimately set up, would otherwise have been referable.

It may be that the court did not intend to go any further than the facts in that case required, and only to hold that if the plaintiffs' cause of action was among those which were heretofore triable by jury, neither of the parties to the action could be deprived of such right, although other issues in the case might otherwise have made the whole action referable. But it seems to me to follow necessarily that where there are several consistent causes of action, united in one complaint, some of which the parties have a right to have tried by a jury, and others of which may be referable, the court can not make a general reference of the action, against the consent of the parties. If it was otherwise, a plaintiff, by merely inserting an additional but referable cause of action in his complaint, could always deprive his adversary of trial by jury in any case of contract ; which, by itself, would be a violation of a constitutional right.

The principle, therefore, to be deduced from the decision referred to is, that *all* the causes of action stated in the complaint must be referable. If part or one only is referable. the court can not refer the others, but as was said in *Townsend v. Hendricks* (*supra*), if such referable issues should ever require examination, a reference can be ordered as to those, after the trial of the other issues. In the later case of *Kain v. Delano* (11 *Abb. Pr. N. S.*, 29), the power to refer is restricted, even in actions arising on contract to cases where the *court can see*, from the proofs before it, that the examination of a long account will be required. In that case there was an affidavit that the trial would require the ex-

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amination of a long account, involving very numerous items of charges and credits, amounting to many thousand dollars, and extending over several years. The proof, the court held, was not sufficient to authorize a reference.

Applying the force of that decision to the case under consideration, it would dispose of the latter upon the same ground. The proofs before the special term were wholly insufficient to enable the court to determine whether the trial would require the examination of a long account in any aspect of the case. There is nothing in the complaint or answer from which it can be seen that any account will require examination; and the affidavit which states merely that the trial will involve the examination of some fifty items of account, upon the authority of *Kain v. Delano* (*supra*), is not enough.

Upon all of these grounds stated, namely—*First*, that there is but one cause of action, *second*, assuming there are two, one is not referable; and *third*, the insufficiency of the proof that the trial will require the examination of a long account, I am of opinion the reference in this case was improperly ordered.

The order should be reversed, with costs.

Schell v. Plumb.

SCHELL *against* PLUMB.

*Supreme Court, Third District, Third Department;
General Term, March, 1873.*

ACTION FOR ENTIRE DAMAGES.—CONTINUING CONTRACT.—OBLIGATION OF MAINTENANCE.—VALUE OF SUPPORT FOR LIFE.—IMPEACHING WITNESS.—
CONTRADICTORY OPINION.

On a total breach of a contract, made for the support of a person for life, an action for entire damages may be maintained. It is not necessary to bring successive actions as time elapses.*

The Northampton tables are admissible in evidence in such a case, to show the probabilities of the life of the plaintiff.†

The rule that it is proper to show that a witness has made an extra-judicial statement, inconsistent and irreconcilable with the facts to which he testifies,—applies, whether the statement be of fact or of opinion, if it be adverse to the story which he has narrated.‡

* S. P., Taylor v. Bradley, 4 Abb. Ct. App. Dec., 363.

† The use of these tables for the same purpose in other cases is sanctioned by Rule 85, 2 Rev. Stat., 106, § 36, as amended by Laws of 1863, ch. 400.

‡ Contradictory statements of *fact*, on material points, have always been held admissible, foundation being laid for them, according to the rule in the Queen's case. For the most recent applications of this rule see Gaffney v. People, 50 N. Y., 416; and Romertz v. East River National Bank, 49 Id., 577; reversing 2 Sweeny, 82. Contradictory statements of *opinion* are also clearly admissible where opinion is material, as in the case of a skilled witness. Extra-judicial statements showing bias or motive, may also be proved, as bearing on the credibility of the witness (People v. Austin, 1 Park. Cr., 154; Clapp v. Wilson, 5 Den., 285; Newton v. Harris, 6 N. Y., 345; Nation v. People, 6 Park. Cr., 258). The admissibility of opinions expressed, irreconcilable with the witness's own testimony, seems to depend on the same principles, and if they are to be excluded, it would be difficult to draw the line between those which discredit directly, and those which discredit by showing bias, and often also between those which are purely statements of opinion as distinguished from those which involve matters of fact. The case in the text must be regarded as overruling to its own extent, at least, the case of Holmes v. Anderson (18 Barb., 420).

*Affirmed
55 N.Y. 592*

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Defendant's testator, in 1856, agreed with plaintiff, for a valuable consideration, to provide her with support and a home for her life. On his death, in 1870, his provision for her maintenance ceased, and she now sued his executors. On the trial plaintiff claimed entire damages for the breach, and was allowed to put in evidence the Northampton tables to prove her probabilities of life.

The plaintiff's evidence in support of the contract was partly contradicted by a witness, Harris, who testified that plaintiff had told him matters indicating that she was with the testator as a servant, or at his pleasure, and that her temper and conduct were bad. On cross-examination this witness was asked if he had said to one Robinson, the year after testator's death, that plaintiff ought to have one thousand dollars out of the estate. He denied having said so. It appeared that subsequent to this alleged statement, the witness had married one of the defendants.

Robinson was then called, and testified that Harris had expressed to him that opinion, intermediate testator's death and Harris' marriage to the executrix.

Verdict for plaintiff.

BY THE COURT.*—MILLER, P. J.—This action was brought for damages sustained by a breach of a contract made by the defendants' testator, in his life, for the support of the plaintiff, and the main question to be determined is, whether an action for entire damages can be maintained for a breach of a contract of this character. While the question is not entirely free from embarrassment, and there are difficulties in many cases in recovering for prospective damages, yet the rule is well settled that such damages may be allowed. In actions for personal injuries occasioned by another, such damages frequently constitute no inconsiderable

* Present, MILLER, P. J., DANIELS and DANFORTH, JJ

Schell v. Plumb.

portion of the amount to be recovered, and must be estimated somewhat upon evidence which forms no very certain basis for accounts and careful calculation. More reliable and satisfactory evidence is furnished in the case at bar, than is usually presented in cases of this character, and I am unable to discover any valid reason why the plaintiff could not recover one entire amount, instead of being compelled to bring separate actions from time to time for separate and distinct breaches of the contract ; thus causing a multiplicity of suits which it is the policy of the law to discourage. The value of the support of an aged person is not difficult to estimate, and in accordance with well established rules which the courts have sanctioned, the value of the life itself can, without much difficulty, be computed.

With evidence tending to show both these essential elements of the plaintiff's right to a recovery of damages, I do not think that it can be fairly claimed that the damages recovered in this case are so uncertain, speculative, and conjectural, as to be beyond any recognized rule of law.

In *Shaffer v. Lee* (8 *Barb.*, 412), an action was brought upon a bond to furnish to the obligee and his wife a support during their lives, and it was held that it was an entire contract ; that a failure by the obligor to provide for the obligee and his wife, according to the substance and spirit of the covenant, amounted to a total breach, and that full damages might be recovered for the future as well as the past. The learned judge, who wrote the opinion in the case last cited, remarks, that when the neglect or misconduct of the defendant is such that the plaintiff may consider it a total breach, entire damages may be recovered.

The distinct question, now considered, was presented upon the trial of that case, and it is an authority directly in point. See also, *Dresser v. Dresser*, 35 *Barb.*, 573.

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There was no error, I think, in introducing the Northampton tables as evidence, and in reading from them so much as showed the probabilities of the life of a person of the age of the plaintiff. These tables are used for the information and guidance of courts of justice, in determining the probabilities of human life and the value thereof, and furnished to the jury some information which rendered material aid in forming a conclusion as to the amount of damages in the plaintiff's case.

They are the results of careful inquiry and the closest calculations of experienced men, which have been adopted by the courts as the most accurate means of estimating the moneyed value of lives, and I see no objection to their introduction as testimony.

The evidence of Robinson to contradict Harris, was I think, properly received. Harris's testimony tended to contradict the plaintiff's evidence as to certain facts, and on cross-examination he denied that he had said that the plaintiff ought to have one thousand dollars out of the estate of the testator.

Such a declaration would have been inconsistent with the testimony which he had given, and, I think, it was competent to contradict him in this respect, by showing that he had made such a statement.

Upon principle, without reference to authority, it seems to me it is very clear that it is proper to show that a witness has made a statement inconsistent and irreconcilable with the facts to which he testifies; and if he denies that he has made any such statement then to show that he has—and it matters not whether it is a statement of a fact or the expression of an opinion, if it be adverse to the story which he has narrated. If it be an opinion in direct conflict with his evidence, it would clearly tend to impair the credit of the witness to some extent, and in many cases, as much, perhaps, as if it was a fact.

I think the judge properly refused to charge as re-

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quested, that if the contract was to provide the plaintiff with a home in the family of the deceased, his death terminated the liability. The purport of the contract, if any was made, was to support the plaintiff during her life, and the general character of the evidence was to that effect; and even if it had been confined to his own family, as it was for the life of the plaintiff, I think that the testator's death would not terminate the obligation.

There was no error in the charge, or in any of the rulings upon the trial, and judgment must be ordered on the verdict for the plaintiff, with costs.

BERRIEN'S ESTATE.

Contra
1 Redf. 323.

Before Hon. Owen T. Coffin, Surrogate of Westchester; October, 1873.

COMPROMISE BY EXECUTOR AND ADMINISTRATOR.—
POWER OF SURROGATE.

The surrogate has power, on cause shown, to authorize an executor or administrator to compound claims due to the estate, whether the debtor be solvent or insolvent.

The case of *Howell v. Blodgett* (5 *N. Y. Surr.* [1 *Redf.*], 323), disapproved.

An application was made in this matter to the surrogate, by the administrator, for leave to compromise a claim of the estate against the Third Avenue Railroad Co., which is perfectly solvent. The claim is for five thousand three hundred and fifty dollars, for labor done under a contract. The company, while admitting the work to have been done, and that it was worth that

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sum, claims that it was not done within the time limited, to its damage of one thousand dollars, and offers to pay the balance, four thousand three hundred and fifty dollars. The administrator conceding that the work was not done within the time fixed by the agreement, and showing the difficulty of a successful resistance of the counter-claim, now asks the court to sanction a settlement on the basis proposed by the company.

Mitchell & Mitchell, counsel for the administrator, —cited 3 *Rev. Stat.*, 174, § 29 (5th ed.); *Blue v. Marshall*, 3 *P. Wms.*, 381; *Pennington v. Healy*, 1 *Crompt. & M.*, 402; *People v. Pleas*, 2 *Johns. Cas.*, 376; *Sipperly v. Baucus*, 24 *N. Y.*, 46; and *Chouteau v. Suydam*, 21 *Id.*, 184.

BY THE SURROGATE.—At common law an executor or administrator could compound or compromise claims belonging to the estate of the deceased, subject, however, to a personal liability to make good the loss, in case, on a final settlement, it should be adjudged that the compromise was fraudulently or improvidently made. The only effect of the sanction of the surrogate under the statute above cited, is to surround the transaction with an air of good faith and honesty. By the next section of the same statute it is provided that such sanction, by the surrogate, shall not prevent any person interested from showing, on the settlement of the estate, that the claim was fraudulently or negligently compromised. This latter provision is a wise safeguard. An application under the statute is made *ex parte* by the legal representative of the estate; the legatees, next of kin, and others interested, not having an opportunity to be heard; but on the final settlement they have the right to scrutinize the transaction. It is left by the statute, discretionary with the surrogate, to

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grant or withhold the authority to compromise, and to prescribe such terms, if the application be granted, as he may see fit.

There is a case reported in 1 *Redf. N. Y. Surr.*, 323 (*Howell v. Blodgett*), where the surrogate of Ontario held that he had no power to sanction the compromising of a claim against a solvent debtor. He claimed, as the basis of his decision, that prior to the passage of the statute in question, executors and administrators could not compound the debts due their testators or intestates, which were doubtful or bad, without being liable for the loss personally, and that, to remedy this evil, the statute was enacted. I think the learned surrogate was in error upon this point. As long ago as the case of *Blue v. Marshall* (3 *P. Williams*, 381), it was held that where a legal representative had compromised a bad or doubtful claim for the benefit of the estate, the court would sanction the act. The following authorities sustain this view: *Legh v. Holloway*, 8 *Ves.* 213; and see 1 *Crompt & M.*, 402; S. C., 3 *Tyrwh.*, 319. In the case of *The People v. Pleas*, cited by counsel, the doctrine in the case of *Blue v. Marshall* is quoted and approved by KENT, J.; and in *Chouteau v. Snydam*, the common-law right of a legal representative to compound debts, is clearly recognized. The court says: "The object of the statute in question was, not to confer upon executors and administrators powers which otherwise they would not possess, but to afford them *additional* protection when acting in good faith in the exercise of their common-law power. Although they could compromise a claim or compound a debt without the aid of the statute, still they might, perhaps, be held responsible for any serious error in judgment in so doing."

I have no doubt that surrogates have the power, on good and sufficient cause being shown, to authorize the

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compounding of claims due to estates, whether the debtor be solvent or insolvent.

Deeming the cause shown in this case sufficient, the application is granted.

STEINFELD *against* LEVY.

City Court of Brooklyn; Special Term, November, 1873.

PLEADING.—CONSIDERATION OF CONTRACT TO MARRY.
—AMENDMENT.—NEW TRIAL.

Where, by the complaint, the promise of marriage is stated to have been in consideration that the plaintiff would have carnal connection with the defendant, the plaintiff can not recover.

Where a part of a consideration of a contract is good, but the other part grossly immoral, the two being joined as one transaction, the whole fails.

It seems, that the complaint may be amended after new trial granted, if cause can be shown.

The facts sufficiently appear in the opinion.

Marks & Poucher, for plaintiff.

Albert Cardozo, for defendant.

NEILSON, Ch. J.—This action, for the breach of a promise of marriage, was tried before a late judge of this court, and the plaintiff had a verdict for seven thousand eight hundred and sixty-five dollars. The application

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for a new trial, which could not be heard before him by reason of the expiration of his official term, is now brought on by arrangement of counsel.

In my view of the case it becomes necessary to consider only one of the questions raised at the trial.

The pleader in drawing the complaint seems to have been aware that in counting upon a contract, a consideration for the promise should be alleged, but not that an averment of mutual promises was requisite or sufficient, or that the particular consideration stated must be meritorious. He therefore charges the defendant with having made a proposal and promise of marriage in consideration of illicit intercourse. The entire consideration for the engagement is thus stated in the complaint. It is hardly necessary to say that a contract thus grossly immoral would not support the action (1 *Story on Contr.*, §§ 458, 460, 490, 541 ; 1 *Pars. Contr.*, 5th ed., p. 455 ; 2 *Id.*, p. 68).

This objection, raised, repeated, and urged on the trial, was overruled, and exceptions taken.

The learned presiding judge seems to have had in view the rule that where a contract is founded on two considerations, one of which is merely void, but not vicious, and the other good, the contract is binding to the extent of the good consideration. He ruled that "if, in fact, mutual concurrent promises to marry were a part of the consideration, the plaintiff could recover." It does not seem to have occurred to him that such a rule would tend to legalize contracts for prostitution, or that the principle in view is never applied to an agreement tainted with immorality. Courts of justice will not aid the illicit or corrupt arrangement, or sift out one part of it to save the other part. When a portion of the consideration is valid, and the other *malum in se*, the failure is entire: the maxim *ex turpi contractu non oritur actio* applies (4 *N. Y.*, 449 ; 20 *Barb.*, pp. 437-8 of Op. per ALLEN, J.).

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As the complaint contained no averment of mutual promises, or of a promise by the plaintiff, her counsel moved to amend by having the pleadings conformed to the proofs. The court suggested that he should indicate what precise alteration of the complaint was desired, and that the same should be written out and verified. The counsel, instead of urging or adhering to his application, accepted that suggestion, and specified the only amendment he desired, to wit: "by adding the words, 'and the said plaintiff promised to marry the defendant,' after the allegation of the promise on his part." With this amendment the complaint gave in due order the base proposal and promise on his part, the acquiescence and the promise on her part, and left undisturbed the immoral character of the arrangement. It thus became, and remained, impossible to sever the mutual promise from the objectionable consideration interwoven with it. Indeed, the amendment does not seem to have been framed, or, at the point designated, inserted in the complaint, with any view to such severance or reformation.

A new trial must be granted. But that will be fruitless to the plaintiff unless this complaint can be reformed, and the objectionable statement expunged, or properly placed. The counsel now acting for the plaintiff may consider whether such facts can be presented to the court on a formal application as will justify the amendment. In *Bigelow v. Law* (5 *Abb. Pr.*, 455), the complaint was amended after having been dismissed. If the mutual promise, prior to and separate from the immoral features of the transaction, can be averred, those features might be retained and the complaint be good. But, as this pleading now stands, it would not appear by the judgment roll that the plaintiff was entitled to recover; such a record would be unfit to go upon the files of the court.

New trial granted.

Thompson v. Craig.

THOMPSON *against* CRAIG.

*Supreme Court, Third Department; Sixth District,
General Term, September, 1872.*

EVIDENCE.—RATIFICATION.—FALSE REPRESENTA-
TIONS.

It is not enough to establish a ratification of representations made by a third person not shown to be authorized, nor to assume to act as agent, to prove that the buyer, after discovering the defect, informed the vendor of such representations, and offered to return the thing sold, and that the vendor refused to accept it.

To establish such ratification, knowledge of all the facts before receiving the fruits of the sale must be shown.

Cornelius Thompson sued James R. Craig on an alleged breach of warranty in the sale of horses. It appeared that one Morgan bought the horses with money furnished by defendant, and undertook on his own responsibility to sell them to the plaintiff. The details appear in the opinion. On the trial the plaintiff recovered three hundred dollars. On motion at special term, before Mr. Justice JACKSON, a new trial was granted, and from the order granting it, the plaintiff now appeals.

J. S. Landen, for appellant and plaintiff.

E. W. Paige, for respondent and defendant.

BY THE COURT.*—MILLER, P. J.—A new trial was granted by the judge at special term, upon the ground

* Present, MILLER, P. J., and POTTER and PARKER, JJ.

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that there was no evidence to show that the defendant was a party to the agreement with the plaintiff, or that he had legally ratified or adopted the same. Also, upon the additional ground that the court erred in refusing to charge as requested,—that the warranty having been made by Morgan, and the representations of ownership by the defendant, and there being no proof that plaintiff knew or had reason to believe that Morgan was defendant's agent in making the warranty, and also no proof that defendant, when he made the representations, knew that Morgan had made the warranty, the plaintiff can not recover.

As to the first ground, the testimony of the plaintiff must be taken as true for the purposes of the motion made at special term for a new trial. According to the plaintiff's version, the only warranty proved was the representations made by Morgan. The plaintiff testifies that after the negotiations with Morgan for the purchase of the horses, and having been informed that the defendant had some interest in the horses, he asked the defendant if the horses were his. The defendant replied that they were; that he had furnished Morgan the money to buy them, and stated the reasons why he did not wish to keep them. That plaintiff then told the defendant what talk he had with Morgan, and also stated the offer he had made Morgan of four hundred and fifty dollars, and he testified that they traded on this basis. As the plaintiff did not state what representations were made by Morgan, the inference is irresistible, that the defendant had no knowledge of any such representations. The talk with Morgan must, I think, be construed as referring to such conversation, as it appears he communicated to the defendant at the time, and nothing more. The defendant was not then liable upon a warranty made by himself; and to make him liable, it should be made to appear either that Morgan acted as his agent, or that defendant subsequently

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ratified Morgan's warranty. There is certainly no direct evidence of Morgan's authority to act as defendant's agent. Although Morgan purchased the horses for the defendant, and had them in his possession, and undertook to dispose of them, there is nothing in the case which shows any understanding or agreement between them which gave Morgan authority to sell for the defendant, and as his agent. It is true that Morgan told him of an offer he had from the plaintiff of four hundred and fifty dollars for the horses ; but I do not understand him as stating that he accepted that offer. On the contrary, the defendant told the plaintiff that he could have the horses ; that he was authorized and had interest enough in them to sell them ; that he had loaned money to Morgan, and bought these horses, and wanted to get rid of them. There clearly was no acknowledgment of Morgan's right to sell as agent, nor can any such authority be inferred from the testimony. The plain facts are : That Morgan bought the horses with money furnished by the defendant, and undertook to sell them to the plaintiff. The defendant, upon being informed that Morgan had negotiated for a sale, stated the facts, as to his interest in the horses, and the terms upon which they could be purchased.

If the plaintiff purchased of the defendant, there was no warranty. If he purchased of Morgan, as the evidence does not show that Morgan was authorized as agent, or even that he assumed to act in that capacity, and that plaintiff knew of the agency, or had any information that the defendant was interested until after he had terminated negotiations with Morgan, the representations made by Morgan would not bind the defendant, unless there was a subsequent ratification of Morgan's acts.

It is not enough to establish a ratification, that the plaintiff informed the defendant, after he discovered the defect in the horses, of the representations made by

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Morgan, and offered to return them, and the defendant refused to accept them.

The appropriation of the fruits of the wrongful acts of an agent, with a knowledge of all the facts, generally constitutes a ratification, and renders the principal liable to the same extent as if the acts had been authorized by express direction (*Murray v. Brininger*, 3 *Keyes*, 109). So when a party claims, receives, and retains the property, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency, which evinces his assent to the contract or the wrong (*Smith v. Tracy*, 36 *N. Y.*, 83, and authorities cited). But the defendant is not brought within the principle of these cases. It will be seen that knowledge of all the facts is essential; and this must be before receiving the money, according to the last case cited.

In *Keeler v. Salisbury* (33 *N. Y.*, 648), the court say: "It is enough that with the knowledge of what the agent has done in his name, he should consent to be bound by it, and manifest such intent to the other party in an unequivocal manner." It can not be claimed, I think, that any intent was manifested here by a refusal to return the money, for, in fact, the defendant refused to be bound by the warranty. Perhaps the principal may ratify the agent's unlawful acts, as is claimed by the plaintiff's counsel; but as there was no evidence of any acknowledged agency, it can not well be urged that a mere refusal to return the money was a ratification. A ratification of the acts of an agent can only be effected when the acts are done by the agent for the principal, and not for the agent himself, as an individual. Such ratification assumes that the act is done for another without competent authority from him (*Story on Agency*, 251).

Hence it has been held that when the agent in making a loan, secured a bonus for himself without the

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knowledge of the principal, the latter did not ratify and adopt the act by receiving the security and seeking to enforce it (*Condit v. Baldwin*, 21 *N. Y.*, 225; *Bell v. Day*, 32 *Id.*, 165). The money illegally received in the cases cited was for the benefit of the agent, but the principle is the same in all cases.

In the case at bar, the alleged false representations were made by a person who had no authority whatever, and who did not assume to act for the principal. The principles referred to, therefore, which relate to an agent, have no application.

The case of a trespass, committed for the benefit of another and adopted by him, is not analagous; for it can not be said, I think, that the defendant adopted the warranty, as he stated the facts as to his ownership of the horses, and it is a fair inference that when he received the money he supposed that he did so in pursuance of the terms stated by him to the plaintiff and no other.

For the same reason this is not a case where the defendant can be said to be turning to his own advantage, what others have assumed to do for his benefit without authority.

As to the second ground, I think the court erred in refusing to charge as requested. This would seem to follow, if the views expressed as to the first ground are correct.

It is not necessary to discuss the other points made, as the order must be affirmed for the reason given. Order of special term affirmed, with costs.

PARKER, J., dissented.

White Hall, &c. R. R. Co. v. Myers.

THE WHITE HALL & PLATTSBURG R. R. CO.
against MYERS.

Supreme Court; General Term, November, 1872.

LIABILITY ON STOCK SUBSCRIPTION.—CAUSE OF ACTION.
—EVIDENCE.—BILL OF PARTICULARS.

An agreement made between the subscribers for stock in a corporation, in anticipation of its organization, separate from, but imposing conditions upon, the subscription, which is itself absolute in its terms, can not impair the validity of such subscription.

In an action by a railroad corporation to recover upon a subscription to its stock, a change of the location and terminus of the road by the corporation, with intent to injure the subscriber, is not available as a defense.

To preclude the party from giving evidence of an account which he has alleged, but not set forth, because pleading under section 158 of the Code, it is necessary that an order of the court should be made to that effect before trial; mere failure to deliver an amended bill of particulars, required by order of the court, is not a sufficient ground on which to exclude it at the trial.

The White Hall & Plattsburg R. R. Co. sued Michael J. Myers in this court for the balance due on his subscription to the capital stock of the plaintiff's corporation, made on the first organization of the company, in January, 1866. The articles of association set forth that the railroad should be constructed from the town of White Hall, in the county of Washington, to the village of Plattsburg, in the county of Clinton, and, further, that it should be constructed into and through the county of Washington.

The complaint alleged the subscription by the defendant to the articles of association, a copy of which articles was made part of the complaint; the agreement

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by him, connected with that subscription, to take twenty shares of the stock at one hundred dollars per share ; the payment by defendant of ten per cent. on his stock ; the due formation of the corporation ; that several calls were made on defendant's stock, and that he refused to pay any sum thereon.

The answer set forth that plaintiff was organized for the purpose of connecting with another railroad, at White Hall, in which defendant was interested ; that thereupon defendant was induced to subscribe on the agreement that plaintiff's railroad was to be built to White Hall, which was to be the southern terminus thereof ; and that the amounts of the subscriptions of residents of Washington county, except the ten per cent. due on the organization of the company, was not to be paid in until the road should be completed in said county ; that no work had been done on said railroad in said county ; that plaintiff had refused to construct the road in said county ; and that plaintiff, with intent to injure and wrong defendant, had changed the location and terminus of said road.

The answer also set up a counter-claim for services rendered and disbursements made by defendant, outside of his duties as president of the corporation, at plaintiff's request.

A bill of particulars of this counter-claim having been demanded, and furnished, the court, upon motion, ordered defendant to furnish an amended bill of particulars, which order he did not comply with.

The cause was tried before a referee, who reported as conclusions of law :

1. That the allegations of the complaint were admitted by the answer.

2. That the first count of the answer (containing all the matter thereof, except the counter-claim) did not constitute a defense.

3. That the defendant, having failed to comply with

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the order of the court for an amended bill of particulars, was precluded from proving the counter-claim; and ordered judgment for the plaintiff for two thousand two hundred and seventy-four dollars and ten cents, with costs.

Defendant excepted.

Judgment was entered on the report, and defendant appealed.

Beckwith and *Dobie*, for defendant appellant,—on the point that defendant was discharged by the change of location and terminus, cited 18 *Barb.*, 312; 18 *Mass.*, 268, 271; 10 *Id.*, 385, 390; 5 *Hill*, 387.

It was error to exclude the account (2 *Robt.*, 681; 7 *Id.*, 566; 8 *How. Pr.*, 329).

Waldo and *Toby*, for plaintiff respondent.

I. Defendant's subscription was absolute, and any understanding with the other stockholders, qualifying it, is void (*Ang. & A. on Corp.*, § 540; 21 *Barb.*, 465; 14 *N. Y.*, 336).

II. Refusal by the corporation to complete the road does not discharge defendant's liability on his subscription (17 *Barb.*, 601; *Ang. & A.*, §§ 541, 542, note 2, § 707; 22 *N. Y.*, 275; 36 *How. Pr.*, 21; 2 *Per. & D.*, 648; 18 *Eng. L. & E.* [1 *Ell. & B.*], 222; 2 *Penn.*, 246, 456; 2 *W. & Serg.*, 157; 21 *N. Y.*, 80; 16 *Id.*, 463).

III. Defendant was precluded from proving the counter-claim (*Code*, § 158; 17 *Abb. Pr.*, 339; 2 *Robt.*, 685; 1 *Daly*, 168).

BY THE COURT.*—MILLER, P. J.—The answer of the defendant alleges that he signed the articles of

* Present, MILLER, P. J., POTTER, and PARKER, JJ.

association, and subscribed for the stock, upon an understanding and agreement with the subscribers, that certain conditions stated were to be performed, which were not fulfilled, and that the plaintiff made a change in the location and terminus of the road, with the intent to injure and wrong the defendant and others, residing at White Hall, who were induced to subscribe by the promise and agreement that the road should run to and terminate at the latter point.

The question presented upon these facts, assuming them to be true, is, whether the defendant thereby became discharged from all liability to pay his subscription for the stock in question.

The alleged agreement was with the subscribers and not the corporation, and it is difficult to see how an agreement of such a character, made in anticipation and with a view of organizing a railroad corporation, can impair the validity of a written subscription to the capital stock, which is absolute and unconditional upon its face. The admission of evidence to show such an agreement would open a wide door for testimony in violation of the rule that parties who execute any instrument should be held to its terms as indicative of their intentions, and not be permitted to resort to simultaneous declarations or extraneous evidence (*P. & S. P. R. R. Co. v. Griffin*, 21 *Barb.*, 465).

In *The Buffalo & N. Y. C. R. R. Co. v. Dudley* (14 *N. Y.*, 336), it was held, that an alteration by the legislature, of the company's charter, whether beneficial to the defendant or not, and a fraudulent representation made by one of the company's officers at a public meeting, in the presence of a majority of the board of directors, but not in pursuance of any authority from, or resolution of, the board, does not discharge the defendant from liability upon his subscription (See, also, *Ang. & A. on Corp.*, § 540). The case at bar is not as strong as the one cited from 14 *N. Y.*, 336, as the

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alleged understanding here, was not with any officer of the company, but between the defendant and other subscribers of stock.

The *T. & B. R. R. Co. v. Warren* (18 *Barb.*, 310), relied upon by the defendant, is not in conflict with the principle laid down in 14 *N. Y.*, and the latter case questions the authority of 5 *Hill*, 382. The cases in 8 *Mass.*, 268, and 10 *Id.*, 385, which are also relied upon, must yield to the decision of the court of appeals, in 14 *N. Y.*, if they can at all be considered as supporting adverse views.

It follows from these remarks, that any condition affixed to the agreement by the subscribers, limiting their liability, could not change the character or import of the subscription, and was null and void.

The allegation that the terminus was changed with an intent to injure the defendant, can not, I think, affect the right of the plaintiff to recover the amount subscribed by the defendant. Upon what principle the act of a corporation intended to operate injuriously upon its stockholders, can be considered as a defense to an action to recover an amount due upon a subscription, I am unable to determine.

If there is any remedy to prevent an unlawful act, or to compel the performance of duties imposed, it must be in a separate action against the corporation or its officers (*Bissel v. Michigan S. & N. I. R. R. Co.*, 22 *N. Y.*, 275).

I think that the referee erred in holding that the defendant was precluded from proving the counter-claim set up in the action. Section 158 of the Code provides that "it shall not be necessary for a party to set forth in the pleadings the items of an account therein alleged; but he shall deliver the same within ten days," &c., or "be precluded from giving evidence thereof. The court, or a judge thereof, or the county judge, may order a further account when the one delivered is defective; and

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the court may, in all cases, order a bill of particulars of the claim of either party to be furnished." To preclude the party from giving evidence of an account under this provision, it is necessary, I think, that an order of the court should be made to that effect. It is not within the province of the court to exclude testimony offered as a question of evidence, when the party neglects or refuses to deliver an amended bill of particulars, as required by the court; but an application must be made directly to the court for the purpose of obtaining such an order prior to the time of trial. Such appears to have been the practice, and there is no case which holds that a failure to comply with an order, of itself, precludes the defendant from proving a counter-claim upon the trial (*Kellogg v. Paine*, 8 *How.*, 329; *Goings v. Patten*, 17 *Abb.*, 339; *Same v. Same*, 1 *Daly*, 168; *Watt v. Watt*, 2 *Robt.*, 685).

For the error of the referee last stated, the judgment must be reversed, and a new trial granted, with costs to abide the event.

TIM *against* TIM.

*Supreme Court, First Department, First District,
Special Term; July, 1874.*

DIVORCE.—PLEADING.

In an action for divorce, allegations of adultery committed with persons unknown to the party pleading, must, nevertheless, state specifically times and places.

A motion to make the pleading more definite and certain will be granted, if the allegation is in the form of a charge of common and

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notorious prostitution, at a certain date and thereafter during the whole of a period indicated, in a certain city.

Irene Tim sued in this court Solomon Tim for a divorce *a vinculo*, on the ground of defendant's adultery.

The answer contained eight defenses, alleging that plaintiff was not defendant's wife, and that he was never married to her, and denied any act of adultery on his part.

The *fourth* defense alleged that the plaintiff's name was not Irene Tim, but was Irene Ashton.

The *fifth* defense was as follows: "That on the 20th day of March, 1869, the plaintiff was and ever since has been a common and notorious prostitute, and has, during all that time, openly and notoriously prostituted herself for hire; and has, during all that time, at divers places in the city of New York, committed adultery with divers men, but with what particular men, or at what particular places in said city, this defendant is now unable to state more definitely."

The *sixth* defense was an admission by defendant that he had committed "adultery" with the plaintiff, but alleged that she was his mistress and not his wife, &c.

The *seventh* defense alleged that he was engaged to be married to a respectable young lady, and the plaintiff becoming aware of the same threatened to expose defendant's "adulterous" intercourse with her, and he, fearing exposure, paid her the sum of eight hundred dollars, and obtained from her a general release of all claims.

The *eighth* defense charged that the action was only brought to extort money.

Upon motion, Mr. Justice DONOHUE struck out the fourth, sixth, seventh, and eighth defenses, as irrelevant and redundant, holding that there but two ques-

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tions under the pleadings which were properly in issue, and material :

First. Was the plaintiff the wife of the defendant ?

Second. If she was, did plaintiff, or defendant, or both, commit adultery ? The motion to make the *fifth* defense more definite and certain is now made.

George F. and J. C. Julius Langbein, for plaintiff, for the motion.

William F. Howe, for defendant, opposed.

LAWRENCE, J.—The fifth paragraph of the answer must be more definite and certain, by stating the times when, and the places at which, the plaintiff committed the alleged adulteries.

The adultery of the plaintiff must be set up in an answer in the same manner, accompanied with the same allegations, as required when the defendant is charged in a complaint with the commission of adultery (*Monnell v. Monnell*, 3 *Barb.*, 236 ; and see *Anonymous*, 17 *Abb. Pr.*, 48).

In *Hyde v. Hyde*, 4 *Sandf.*, 622, an allegation, “that the defendant, in November, 1851, committed the offense in the city of New York, with a female whose name is unknown to the plaintiff, and the particular circumstances of which are unknown to the plaintiff,” was held to be insufficient; and it was further held, that “if the person be unknown, the complaint should state specifically the place where the offense occurred, and at a house specified, or the like.” In this case the defendant avers that the parties, with whom the adulteries alleged were committed, are unknown to him ; and under the authority just cited, he is, perhaps, warranted in making the allegation in that respect, in the form in which it is made, but he is not warranted in omitting

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to state in his answer the times and places at which the offenses were committed.

Motion granted, to the extent above stated, with ten dollars costs of motion.

SANBORN *against* LEFFERTS.

Court of Appeals, September, 1874.

MANUFACTURING CORPORATION.—CAUSE OF ACTION.
—STOCKHOLDER AGAINST DIRECTOR.—CONFLICT
OF TESTIMONY.—QUESTION OF FACT.

In an action to charge defendant with a debt of a corporation, of which he had been a trustee, defendant, being examined as a witness, testified that he ceased to act as a trustee on a day specified, when his office terminated; but he also testified that on a subsequent day he was present at a meeting of the trustees, and referred to himself in conversation as being one of the trustees, and, also, that there had been no other trustee chosen in place of himself. *Held*, that the statement that he ceased to act as a trustee must be regarded as his own legal conclusion, and not as creating any conflict in his testimony, which would require the court to submit to the jury the question whether he was holding over subsequent thereto.

Extra judicial proceedings of a manufacturing corporation to close its business and wind up affairs, do not exempt the trustees from the statutory liability for failure to publish the prescribed report, even as toward a creditor, who is also a stockholder, and who participated in the proceedings for dissolution.

A creditor of a manufacturing corporation, though he be also a stockholder, may hold a trustee liable on the ground of failure to publish the annual report, in the absence of any thing to show that, as stockholder, he has become personally liable for the debts.

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In an action in the city court of Brooklyn, an objection to the jurisdiction on the ground that the cause of action did not arise within the county, is waived if not taken upon the trial, and if it does not appear by the record that the summons was not served within the city.

Daniel A. Sanborn sued Marshall Lefferts, Edward A. Eaton, and others, in the city court of Brooklyn, to charge them as individually liable for a debt of the Ventilating Rubber Shoe Company, a corporation formed under the general manufacturing, &c. corporations act of 1848, and the amendments thereto. The complaint alleged that plaintiff was a resident of the city of Brooklyn; that at the times therein mentioned, the defendants were the trustees of the corporation; that on September 1, 1869, before the time for filing the annual report, afterward mentioned, plaintiff made a specified loan of money to the company; that on August 5, 1871, he sued the company, in the city court of Brooklyn, in the county of Kings, to recover the balance of the loan then due, and on August 29, 1871, recovered judgment against the company, a transcript of which was, on the same day, filed with the county clerk of New York, that being the county where the company had its principal office for transaction of business; and that execution in both counties had been issued and returned unsatisfied; that the company did not, within twenty days from January 1, 1870, make, and publish the report required by the statute, nor had they at any time since made or published such report.

Marshall Lefferts answered, admitting that he, at one time, acted as trustee of the company, which was a corporation until about January 14, 1870, and admitted that a loan was made to the company by plaintiff previous thereto.

For a second defense [the first so-called "defense" being merely a paragraph of admissions], he averred

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that the city court never had jurisdiction of the action against the company.

For a third defense he denied all allegations not before admitted.

For a fourth defense he alleged that on October 14, 1869, at a special meeting of the members and stockholders, they resolved that the company should be closed up without delay, and, at a subsequent meeting, directed the trustees to sell the property, pay the debts, and divide the surplus; and also requested plaintiff (who was a stockholder), and another person, to advise with the trustees in so doing; and that they acceded to the request; and that before the expiration of the twenty days, from January 1, 1870, the company entirely suspended business, sold all its property, ceased to exist as a corporation, and the proceeds of its property were applied, as far as they would go, to extinguish the outstanding liabilities.

On the trial of the cause, before NEILSON, J., and a jury, plaintiff had a verdict. The testimony sufficiently appears, in connection with the exception, in the opinion of the appellate court.

On appeal to the court at general term, the judgment was affirmed, the following opinion being delivered.

BY THE COURT.—McCUE, J. [After briefly mentioning the nature of the action.]—Before passing to the main question presented by the appeal, I will notice a preliminary point made in the argument which involves the jurisdiction of the court.

Under the act of 1871, in relation to this court (chapter 282), jurisdiction was given when any of the parties resided in the county of Kings. The plaintiff resided in the city of Brooklyn when this action was commenced, but the defendant Lefferts did not.

In 1872 (chapter 688) the jurisdiction of the court

was curtailed and limited in respect to actions like the present one, to cases where any of the defendants shall reside or be personally served with the summons within the said city.

By some singular omission this act did not contain the provisions contained, it is safe to say, in ninety-nine out of every hundred acts passed :

“ This act shall take effect immediately.”

The act of 1872 (chapter 688) was passed on May 14, 1872 ; and the judgment in this action was entered May 23, 1872.

The counsel of appellant Lefferts contend that as, by the amendment of 1872, jurisdiction over the person of the defendant was taken away before judgment was actually entered, there was no authority to enter any judgment ; assuming the act of 1871, which gave the court jurisdiction where the summons was served outside of the city of Brooklyn, was constitutional.

The counsel's attention, however, was not called to the fact of the omission of the clause that the act should take effect immediately.

The effect of the omission was to put into effect the provisions of the Revised Statutes that every law, unless a different time shall be prescribed therein, shall commence and take effect throughout the State, on, and not before, the twentieth day after the day of the final passage, as certified by the secretary of state (1 *Edm. Stat.*, 156, § 12). Having been passed May 14, 1872, the act did not take effect until June 3, 1872, after the entry of the judgment herein. This disposes of the question of jurisdiction, and answers the very elaborate and interesting resume of the cases touching this particular point of jurisdiction presented by appellant's brief.

The provision of the statute compelling the publication of the report as to the capital amount of debts, &c., is certainly arbitrary, but it (is) nevertheless clear

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and peremptory in its terms. The failure to comply with this requirement incurs the liability for all debts of the company "then existing." No distinction is made in favor of creditors who are not stockholders. The liability is for the debt, no matter by whom held.

The defendant Lefferts can not avail himself of the point that he was not legally a trustee. Whatever informality attended his election, it appears that he acted as such trustee.

Upon a review of the whole case, I am of opinion that the judgment and order appealed from should be affirmed, with costs.

THOMPSON, J., concurred.

The defendant appealed to this court.

Burton N. Harrison, for defendant appellant.—I. The city court had no jurisdiction of the present action, for it was an action for a penalty (*Merchants' Bank v. Bliss*, 1 *Robt.*, 391 ; 35 *N. Y.*, 412 ; *McHarg v. Eastman*, 7 *Robt.*, 140 ; *Bird v. Hayden*, 2 *Abb. Pr. N. S.*, 61 ; *Dabney v. Stevens*, 40 *How. Pr.*, 345 ; *Nimmons v. Tappan*, 2 *Sweeny*, 652). And the cause of action on such a penalty arises in the county where the default to file report occurs ; that is, the county where the company was established and had been doing business. The complaint, which alleged that the summons and complaint in the former action were duly served on said company personally, must be construed to import that the company was established in Kings county ; if not, the complaint should have been dismissed for not stating facts sufficient to constitute a cause of action ; and as the evidence does not supply the defect, the court should now dismiss the complaint for that reason, even though it appears that the objection was not taken on the trial (37 *N. Y.*, 641 ; 2 *Duer*, 125 ; *Code*, § 148)

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But, conceding the sufficiency of the complaint, any allegations which could tend to show jurisdiction in the city court were denied in the answer ; and on the trial plaintiff himself disproved them by showing that the company was established and did business only in New York and Westchester counties, and that the service of summons was made on the company in New York. This is not one of the cases in which defendant could have had a change of place of trial, for it was brought in a city court, not the supreme court ; and the act of 1872, as to removal of causes, did not become a law until after the trial. The objection being to the jurisdiction, it is always available (*Code*, § 148).

II. Defendant is not estopped from objecting that he never was a trustee, by having acted as such while supposing himself to be one (*Briggs v. Easterly*, 62 *Barb.*, 51 ; *Craw v. Easterly*, *Ib.* ; affirmed by commission of appeals, 54 *N. Y.*, 679).

III. He was not a trustee when the debt existed and the default occurred (*Shaler v. Bliss*, 27 *N. Y.*, 300 ; *Deming v. Puleston*, 33 *N. Y. Supr. Ct.* [1 *Jones & S.*], 231 ; *Vincent v. Sands*, 11 *Abb. Pr. N. S.*, 373 ; *S. C.*, 33 *N. Y. Supr. Ct.* [1 *Jones & S.*], 511 ; *People v. Arguello*, 37 *Cal.*, 525 ; *Wood v. Partridge*, 11 *Mass.*, 488 ; *Nimmons v. Hennion*, 2 *Sweeny*, 667 ; *Oviatt v. Hughes*, 41 *Barb.*, 541 ; *Garrison v. Howe*, 17 *N. Y.*, 458).

IV. The court had no jurisdiction to render the judgment against the company, for the company never transacted their general business in Brooklyn, nor was established by law there (*Laws of 1870*, ch. 470, § 2, subd. 6).

V. One who was a stockholder—that is, a member of the company at the time of the default—can not hold the trustees liable under section 12. The report is required to be made by the company, and every member of the company is in default. Certainly, one is who

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instead of urging compliance with the law urged, as plaintiff did, that all business be discontinued. Moreover, it is against the policy of the law to allow a stockholder to maintain the action (*Boughton v. Otis*, 21 *N. Y.*, 264; *McHarg v. Eastman*, 4 *Robt.*, 636; *Shaler & Hall Quarry Co. v. Bliss*, 27 *N. Y.*, 299; *Briggs v. Easterly*, 62 *Barb.*, 60; *Cable v. McCune*, 26 *Mo.*, 380; *Bailey v. Bancker*, 3 *Hill*, 191; *Oviatt v. Hughes*, and *Briggs v. Easterly*, above cited; *Andrews v. Murray*, 33 *Barb.*, 354; *Kritzer v. Woodson*, 19 *Mo.*, 329; *Richardson v. Abendroth*, 43 *Barb.*, 165).

VII. As defendant Lefferts contradicted all the allegations of fact necessary to entitle plaintiff to recover, he was entitled to have the question submitted to the jury.

VII. The city court of Brooklyn had no jurisdiction in this action, for it was proved on the trial, and admitted on the argument at general term, that Lefferts, the defendant, is not a resident of Brooklyn, and that the summons was not served on him there. The jurisdiction of the court must appear on the record (*Frees v. Ford*, 6 *N. Y.*, 178; *The Clyde, &c. Co. v. Parker*, 22 *Barb.*, 323; *Landers v. Staten Island R. R. Co.*, 14 *Abb. Pr. N. S.* 346).

Nathaniel C. Moak, for plaintiff respondent.—I. It is the duty of the court to nonsuit a plaintiff or direct a verdict where a contrary one would be set aside as against evidence (*Loomer v. Meeker*, 25 *N. Y.*, 361; *Wilds v. H. R. R.*, 24 *Id.*, 430; *Steves v. Oswego, &c.*, 18 *Id.*, 425; *People v. Cook*, 8 *Id.*, 74). A jury has no right arbitrarily to decide against uncontradicted evidence; and should it do so, it would be the duty of the court to grant a new trial (*Loomer v. Meeker*, 25 *N. Y.*, 361, 363; *Siebert v. Erie R. R. Co.*, 49 *Barb.*, 586; *C. B. & Q. R. R. v. Stumps*, 55 *Ill.*, 367, 375; *Jaeger v. Kelley*, 52 *N. Y.*, 274).

II. The city court of Brooklyn had jurisdiction of the cause of action. The statute under which the liability arose was *Laws of 1849*, p. 57, § 12, 3 *Edm. St.*, 735, as amended in 1870. This action was commenced in December, 1871, the answer being verified in January, 1872. The trial took place on April 17, 1872. The constitution, as amended in 1869, art. 6, sec. 12, provides that the city court of Brooklyn, among others, shall be continued with the powers and jurisdiction it then had, and such further civil and criminal jurisdiction as might thereafter be conferred by law. This constitutional provision made valid all existing statutes conferring jurisdiction upon that court, subject to future changes by the legislature. In order to determine what jurisdiction the city court of Brooklyn possessed, by reference to the statutes, we find that the court, with limited jurisdiction, was created in 1849 (*Laws of 1849*, p. 170), extended by the act of 1870 (1 *Laws of 1870*, p. 1045-6), subdivision 5 of which was as follows: "5. To all other actions, when the cause of action shall have arisen in the said city, or when any of the defendants shall reside, or be personally served with the summons within the said city. In 1871, when this action was commenced, and tried, this subdivision was amended (1 *Laws of 1871*, ch. 282, p. 566-6), so as to read as follows: "5. To all other actions, when the cause of action shall have arisen in, or when any of the parties to said action shall reside within the county of Kings, or when any of the defendants shall be personally served with the summons within said county." Under this statute jurisdiction depended upon either of the following facts: 1. The cause of action having arisen within the county of Kings, irrespective of the residence of the parties. 2. The residence of any of the parties to the action within the county. 3. Service upon the defendants, or some of them, within the county. This statute was clearly authorized by section 12 of art. 6 of the

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constitution, before referred to, and section 19 of the same article which provides: "Inferior local courts of civil and criminal jurisdiction may be established by the legislature." The complaint alleged the plaintiff's residence in the county of Kings, and the evidence upon the trial established it. The verdict was rendered April 17, 1872, and the judgment was entered May 23, 1872. The act of 1872 (2 *Laws of 1872*, ch. 688, p. 1642-4) was passed May 14, 1872, and as it contained no provision that it should take effect immediately, it did not take effect until June 3, 1872 (1 *Rev. Stat.*, 157, § 12; 1 *Edm. Stat.*, 156). When the judgment was entered, therefore the court had ample jurisdiction. 1. Section 124 of the *Code* does not apply to the Brooklyn city court. The statute conferring jurisdiction upon that court was passed long after the *Code*, and so far as the latter was inconsistent therewith was repealed thereby. 2. The objection that the court below had no jurisdiction was not taken in the court below. The defendant had appeared and answered without taking the objection by answer or demurrer. By so doing he submitted to the jurisdiction of the court, and waived the objection if valid (*Fairbanks v. Corlies*, 3 *E. D. Smith*, 582; 1 *Abb. Pr.*, 150). The *Code* provides that "a voluntary appearance of a defendant is equivalent to personal service of the summons upon him" (*Code*, § 139, and cases cited by Mr. Wait in his *Code*; *Schwinger v. Hickox*, 46 *How.*, 144). An unqualified appearance by attorney is sufficient (*McCormick v. Pennsylvania, &c.*, 49 *N. Y.*, 308-9). It has been expressly held of a justice's court, that although jurisdiction by process could only be obtained against a non-resident by a short summons, yet if he appeared on service of a long summons and answered, he submitted to the jurisdiction of the court, and its judgment was valid (*Clapp v. Graves*, 26 *N. Y.*, 418). The United States circuit court has no common-law jurisdiction. Its statutory

jurisdiction is expressly made to depend upon the defendant's being a resident of the district, or being served therein with process. In *Gracie v. Palmer* (8 *Wheat.*, 699), the supreme court of the United States held that, "it is not necessary to aver on the record that the defendant in the circuit court was an inhabitant of the district, or was found therein at the time of serving the writ. When the defendant appears without taking the exception, it is an admission of the regularity of the service." 3. An objection to the jurisdiction of the court, which might have been obviated by proof upon the trial, can not be taken for the first time upon appeal (*Van Deusen v. Sweet*, 51 *N. Y.*, 378, 385-6). So even a question, as to the constitutionality of a law, can not be raised for the first time in the court of appeals (*Delaney v. Brett*, 51 *N. Y.*, 78). In *Landers v. Staten Island R. R. Co.* (14 *Abb. Pr. N. S.*, 346, 358; 13 *Abb. Pr.*, 338), the objection was expressly taken and pleaded by the fourth defense in the answer, and insisted upon the trial. Again, there was not a particle of proof, on the trial, as to *where the defendant resided*. The statement in the opinion of the court below as to his residence was an assumption by the court, without examination, and was not supported by any evidence. In *Landers v. Staten Island R. R. Co.*, the court, by Judge ALLEN, said (p. 356) that in *Bidwell v. Astor, &c.* (16 *N. Y.*, 263), the question of jurisdiction not having been raised in the court below, was not considered in this court, and that, in *International Bank v. Bradley* (19 *N. Y.*, 245), all that was adjudged was, that after judgment, it was to be presumed, in support of the jurisdiction of the court, that the facts conferring jurisdiction existed. In *Van Deusen v. Sweet* (51 *N. Y.*, 385), in answer to the objection that it did not appear that the county court had jurisdiction of lunacy proceedings, the court said: "In answer to which, it is sufficient and only necessary to say that the record is not required to

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show affirmatively, and on its face, those facts. It is enough that they exist, and were properly shown to the court, and as it was not on the trial claimed, in support of either the first or sixth objection, that they were not established by proper proof, it is too late to raise the question on this appeal. If it had been raised at that time, the objection would have been obviated by competent testimony.” 4. In the making and settlement of a case or bill of exceptions, only the evidence bearing upon the questions of law sought to be reviewed, should be inserted. For aught which the court can know, the facts conferring jurisdiction were fully proven, but not inserted, because no question as to the jurisdiction was reserved by exception. 5. No evidence showing want of jurisdiction was given upon the trial, nor does it anywhere appear by the appeal book where the defendant was served with the summons. 6. The authorities which defendant's counsel cite to show that the cause of action is to recover a penalty, only hold that it should be so held with reference to the time it should be barred within section 92 of the *Code*.

III. That the allegations as to judgment against the company were unnecessary. Counsel cited *Miller v. White*, 50 *N. Y.*, 137; *McHarg v. Eastman*, 7 *Robt.*, 140; *Vincent v. Sands*, 11 *Abb. Pr. N. S.*, 366; 42 *How. Pr.*, 231; *Weymouth v. Dimock*, 41 *Id.*, 92.

IV. As to defendant's liability:—*Squires v. Brown*, 22 *How. Pr.*, 35, 42–4; *Haupt v. Pohlmann*, 16 *Abb. Pr.*, 301; *Briggs v. Easterly*, 62 *Barb.*, 51; *Slee v. Bloom*, 5 *Johns. Ch.*, 366; *McCall v. Byram Manuf. Co.*, 6 *Conn.*, 428, 438–9; *Foot v. Rowse*, 1 *Strange*, 625; *New York, &c. v. Smith*, 4 *Duer*, 362, 375–6; *Nimmons v. Tappan*, 2 *Sweeny*, 652; *Willoughby v. Comstock*, 3 *Hill*, 389; *Burnham v. Wellersburg Coal Co.*, 47 *Pa. St.*, 43; *Culbertson v. Wabash Nav. Co.*, 4 *McLean*, 547; *Miller v. White*, 8 *Abb. Pr. N. S.*, 55; *Bolen v. Crosby*, 49 *N. Y.*, 183.

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BY THE COURT.—RAPALLO, J.—This action is brought to recover from the defendant an indebtedness of the Ventilating Rubber Shoe Co. to the plaintiff, for money borrowed of him in September, 1869. The defendant is sought to be charged on the ground that he was, in the month of January, 1870, one of the trustees of the company, and that no report of the capital and indebtedness of the company was filed or published within twenty days after January 1, 1870, as required by the statute under which the company was organized.

The court directed a verdict for the plaintiff. Many exceptions were taken at the trial, but only two of them, in our judgment, require special notice. The first is to the refusal of the court to submit to the jury the question whether the defendant Lefferts was a trustee of the company after November 10, 1869, or acted as such after that date.

The company was organized under the general act for the incorporation of manufacturing companies, in November, 1868, the term of its corporate existence commencing November 10, 1868. Five trustees were appointed by the articles of incorporation to manage the concerns of the corporation for the first year. The defendant Lefferts was not one of these, but he testified at the trial that he became a trustee of the company about April 5, 1869, in what manner does not appear. He also testified that he ceased to act as trustee in November 1869, when his office terminated. But at the same time he testified that after November, 1869, the affairs of the company were wound up by the sale of its property, and the application of the proceeds so far as they would go to the payment of its debts; that the sale was effected in January, 1870; that the last meeting of the trustees was on January 28, 1870, and they transacted business on that occasion; that he was present at that meeting; that there were no other trust-

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ees at that time than those who carried on the business in November, and the same persons were acting; that as late as March, 1870, there was a small balance in his hands as treasurer of the company, which he told plaintiff, that if the other trustees would consent, he would pay him; that the other trustees, to whom he referred, were those who had been acting with him as trustees, from April, 1869, when he was appointed.

It is clear that the sale of the property, in which the defendant admits that he co-operated, could only be made by the trustees in their official capacity; that those who were in office in November, 1869, were entitled to hold over until others were appointed, and that the defendant Lefferts, although he might have exempted himself from liability by refusing to participate further in the management of the affairs of the company after the expiration of his term of office, did not do so, but continued to unite with his cotrustees in their endeavors to wind up the company. His bare statement that he ceased to act as trustee after November, 1869, when his office terminated, taken in connection with the specific acts to which he testified, was not sufficient to raise a question of fact to be determined by the jury, but must rather be regarded as the legal conclusion of the witness, that the expiration of his term of office terminated his character of trustee.

We, therefore, are of opinion that there was no substantial conflict of testimony in the question whether the defendant was trustee at the time when the report should have been made, and that the court properly refused to submit that question to the jury.

The principal defense set up in the answer is, that the company had, prior to January, 1869, ceased to do business, and was then engaged only in winding up its affairs by the sale of its property, and the payment or compromise of its debts, and that the plaintiff had full notice of this fact, he being a stockholder and partici-

pating in the proceedings. It is scarcely necessary to say, that in the absence of any legal dissolution of the company, their extra-judicial proceedings did not affect the statutory liabilities of the trustees to creditors, or that knowledge on the part of the creditors, of the financial condition and embarrassments of the company, did not exempt the trustees from the statutory circumstances of a failure to file and publish the prescribed report.

The other exceptions taken at the trial, and which have been strongly urged on this appeal, are to the refusal of the court to dismiss the complaint on the ground that the plaintiff was himself a stockholder of the company. It is argued that the liability of trustees of a manufacturing company, under section 12 of the act, for a failure to file and publish a report can not be enforced by a creditor who is also a stockholder. That the object of the requirement is to protect outside creditors who have no means of knowing the financial condition of the company, and can not be enforced by stockholders who are constituent parts of the company, and have the means of informing themselves as to its affairs. In the absence of any discrimination in the statute itself, between stockholders and other creditors, we do not see any ground upon which we can make the distinction. It is true that the statute makes it the duty of the company to file and publish the statement, but this duty is to be performed by the trustees and president, and not by the stockholders (*Bolen v. Crosby*, 49 *N. Y.*, 183). The stockholders are not subjected to any liability for its non-performance. There is no presumption that the plaintiff, in any other manner, became personally liable for the debts of the company, and no proof to that effect, and the reasons which induced the court in *Bailey v. Bancker* (3 *Hill*, 191), and subsequent cases, to hold that one stockholder can not maintain a common-law action against another stock-

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holder to recover a debt for which all the stockholders are liable, do not apply. A stockholder may be a creditor of the company of which he is a member, and may maintain an action at common law for the recovery of his claim (3 *Hill*, 389 ; 47 *Pa. St.*, 49), and we see no ground upon which we should be justified in withholding from him any remedy against the trustees to which other creditors are entitled.

The objection to the jurisdiction of the city court is not tenable. The defendant appeared and answered without taking any objection to the jurisdiction of the court, and raised no such point upon the trial. For aught that appears upon the record, the summons may have been served in the city of Brooklyn, and proof of that fact would have been an answer to the objection, had it been taken.

We have carefully examined the elaborate points on the part of the appellant, but find in them no ground for reversing the judgment. It must be affirmed, with costs.

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*Affirmed
6 July 1871.*BARNES *against* MOTT.

*New York Common Pleas ; Special Term, June,
1873.*

INJUNCTION.—JUDGMENT-LIEN. — SURETYSHIP. — ASSIGNMENT.

The grantee by warranty deed, who takes land without knowledge of a judgment, which is a lien upon it, is, as respects the land, a surety for the payment of the judgment, to the extent of the value of the land.

Such grantee, on being compelled to pay the judgment, to release the land, or on his land being taken to satisfy the judgment, would be entitled to be subrogated to the rights of the judgment creditor, against sureties, who, with a knowledge of the conveyance, executed a bond for a stay of proceedings on an unsuccessful appeal from the judgment, thereby causing a delay in the satisfaction thereof, during which the principal debtor, who was abundantly able to pay at the time of the appeal, became insolvent.

Where an assignee of such judgment, who purchased it with knowledge of all the facts, had released the sureties on such appeal bond,—*Held*, that a perpetual injunction should be granted against the enforcement of the judgment lien by him or by his assignee.

Henry B. Barnes and others sued in this court Jacob H. Mott, Arnold H. Wagner, Clark C. Wilson, Jay F. Darrow, Dexter B. Britton, and Matthew T. Brennan, sheriff, &c., to restrain, by perpetual injunction, the sale of a house and lot in Twelfth street, New York city, under execution on a judgment for seventeen thousand and ninety-three dollars and fifty-eight cents, recovered in this court, February 2, 1864, by one Orchard against the defendant Britton and one Binner, said Britton being at that time owner of the property in question.

In October, 1864, Britton conveyed by warranty deed

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to one Burr, who took without knowledge of the judgment, and paid the value of the premises without abatement therefor.

The plaintiff Barnes is the present owner, the property having been conveyed to him in March, 1873, after intermediate transfers by successive warranty deeds to and by the other plaintiffs in this action, and others.

In 1868, defendants Wilson and Darrow, with knowledge of the conveyance to Burr, executed an undertaking, on appeal, by virtue of which all proceedings on the judgment were stayed until its affirmance in January, 1873.

In 1870, Britton, who was up to that time able to pay the judgment, became insolvent, and Binninger died, leaving no assets. Upon the affirmance, in 1873, suit was brought on the undertaking of Wilson and Darrow, for whom defendant Wagner appeared as attorney. Wagner settled with the holders of the judgment, taking an assignment of the judgment to himself, a discontinuance of the action against Wilson and Darrow, and executed to them a release, they being at the time able to pay the judgment. Wagner at the time of the release knew all the facts, and that the plaintiffs in this action looked to Wilson and Darrow for indemnity.

In March, 1873, Wagner assigned the judgment to the defendant Mott.

A mortgage for six thousand five hundred dollars was on the property, subject to which Burr took it, and which was paid off by Burr's devisees in ignorance of the judgment.

A motion for an injunction *pendente lite*, was argued May 22, 1873.

Benedict, Taft & Benedict, attorneys for plaintiffs.
Addison Brown, of counsel.

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William Fullerton and Luther R. Marsh, counsel for defendants.

J. F. DALY, J.—The *bona fide* purchasers of the house and lot subject to lien of the judgment, being liable to pay it, so far as the premises so conveyed to them would satisfy it, sustained the relation of sureties (bound, not personally, but in property), towards the judgment creditors and their assigns (*Ingalls v. Morgan*, 10 *N. Y.*, 178).

The enforcement of the judgment against the land was delayed and prevented by the intervention of the defendants, Wilson and Darrow, the sureties who executed the undertaking on appeal, by which all proceedings on the judgment were stayed, and this delay continued until the principal debtors (the judgment debtors), became insolvent, so that the remedy of the purchasers of the land upon their covenants was impaired, if not destroyed. Therefore, as between these later sureties, bound personally on the undertaking and the prior sureties bound in property, the last named have the superior equity. The sureties on the undertaking, on paying the judgment, could not be substituted in place of the judgment creditor and enforce the judgment against the land held by the prior sureties (*Armstrong's Appeal*, 5 *Watts & S.*, 352; *Pott v. Nathans*, 1 *Id.*, 155; *Douglas v. Fagg*, 8 *Leigh*, 588; *Givens v. Nelson's Ex'rs*, 10 *Id.*, 382; *Langford's Ex'rs v. Perrin*, 5 *Id.*, 555; *Daniel v. Joyner*, 3 *Iredell Eq.*, 513). On the other hand, the prior sureties or purchasers, if they had paid the judgment, had the right to recover the amount of it from the sureties on the undertaking, for their own indemnity (*Parsons v. Briddock*, 2 *Vern. Ch.*, 608; *Brandenburgh v. Flynn*, 12 *B. M.*, 397; *Bohannon v. Combs*, 1 *Id.*, 563; *Wright v. Morley*, 11 *Vesey*, 22; *Burns v. Huntington Bk.*, 1 *Pa.*, 395).

The judgment creditors and their assigns had the

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right to recover the amount of the judgment from the sureties on the undertaking but not to release the latter, for the prior sureties were entitled upon paying the judgment, to the benefit of all the securities held by the creditor (See cases cited above).

The judgment creditors should have exhausted their remedies against the sureties on the undertaking before resorting to the land, or if not bound to do so, they had no right to release them without satisfaction of the judgment. By doing so, and depriving the prior sureties of their recourse to the undertaking, they lost the right of proceeding against the prior sureties or the land. (Ingalls v. Morgan, 10 N. Y. 178; Stuyvesant v. Hall, 2 Barb. Ch., 151, and cases cited above).

For these reasons the motion for injunction *pendente lite*, should be granted.

Order accordingly.

At the hearing, *Benedict, Taft & Benedict*, for plaintiffs, *Addison Brown*, of counsel, in addition to the cases relied on by J. F. DALY, J. (*supra*), cited,—*Gahn v. Niemcewicz*, 3 *Paige*, 614, 642, 647, 648; S. C., 11 *Wend.*, 312, 317, 324; *Chester v. Bank of Kingston*, 16 N. Y., 336; *Fellows v. Prentiss*, 3 *Den.*, 421; *Clowes v. Dickenson*, 5 *Johns. Ch.*, 235; *Gouverneur v. Lynch*, 2 *Paige*, 300; *Guion v. Knapp*, 6 *Paige*, 35, 42, 43; *Howard Ins. Co. v. Halsey*, 4 *Seld.*, 271; 4 *Sandf.*, 565; *Burns v. Huntington Bank*, 1 *Pa. St.*, 395; *Schentegel's Appeal*, 49 *Id.*, 23; 1 *Lead. Cases in Eq.*, 97; *Delavergn v. Norris*, 7 *Johns.*, 358; *Champlin v. Laytin*, 6 *Paige*, 195; *Meyer v. Clark*, 2 *Daly*, 497; *Simar v. Canaday*, 53 N. Y., 298.

A. H. Wagner, for defendants Mott and Wagner.

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H. T. Marston, for defendants *Wilson* and *Darrow*.

Brown, Hall & Vanderpoel, for sheriff.

DALY, Ch. J.—My general conclusion is that the plaintiffs are entitled to have the assignee of the judgment perpetually enjoined from enforcing it by the sale of the land upon which the judgment was a lien. The necessity for an immediate decision will not admit of anything more than a brief statement of the grounds of that conclusion. They are as follows :

Mott, the present assignee of the judgment, took nothing by the assignment except what it was in the power of Wagner to transfer, and as Wagner purchased the judgment with a knowledge of all the facts, he took it subject to the equitable rights and obligations of the prior parties.

Burr and his successors stood, as respect their rights and interest in the land, in the position of sureties for the payment of the judgment to the extent of the value of the land. The defendants in the judgment were the parties primarily liable, or what is termed the principal debtors, and if they did not pay it, Burr or his successors were bound to do so, or else the land, the judgment being a lien upon it, might be sold to satisfy the judgment, and in either event, Britton would have been bound to indemnify Burr, or his successors, at least to the extent of the consideration received upon the purchase of the land, Britton having sold it to Burr with a covenant of warranty and quiet enjoyment.

Where a lien upon land arises from the recovery of a judgment, it is a right to have the land applied towards the satisfaction of the judgment. The land is a security for the payment of the judgment, and if conveyed to another after the recovery of the judgment, it is transferred necessarily, subject to this lien or charge. The

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party who takes it is, as respects the land, a surety for the payment of the judgment to the extent of the value of the land. He is a surety from the fact that he is not primarily liable for the payment of the debt for which the judgment was rendered, and if the land is taken for the satisfaction of the judgment, or if, to avoid its being so taken, he is compelled to pay the judgment, he has his remedy over, for indemnity, against the judgment debtor, who conveyed the land to him.

It might be otherwise where the property is conveyed with a knowledge of the lien on the part of the grantee, and it is allowed for, or taken into account, in the consideration paid for the land, which was not the case here, for the consideration paid by Burr was the full value of the land, less the mortgage upon it. Indeed, the judgment, which was for seventeen thousand and ninety-three dollars and fifty-five cents, was more than the value of the land, with the incumbrance upon it.

If I am right in the conclusion that Burr and his successors stand, as respects the land and the lien, in the position of surety for the satisfaction of the judgment to the extent of the value of the land, then it follows upon the authorities referred to, that the sureties upon the appeal to the court of appeals, if compelled to pay the judgment, in pursuance to their undertaking, would have had no recourse for indemnity upon the prior surety, and that if the prior surety had been compelled to pay the judgment to release his land, or his land had been taken to satisfy the judgment, that he would have had the equitable right to be subrogated to the rights of the creditor against the sureties upon appeal, through whose intervention all proceedings on the judgment was stayed for the benefit of the judgment debtors, in an unsuccessful attempt on their part to get the judgment reversed, involving a delay of several years, during which period both of the judgment debtors became irresponsible, either of them at the time of the recovery of

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the judgment and before the appeal, having been abundantly able to pay the judgment.

If the creditors had enforced the lien by a sale of the land under an execution upon the judgment, the owner of the land would have had his remedy over against the subsequent sureties upon appeal, or the creditors might upon the authority of *Ingalls v. Morgan*, have been compelled to exhaust his remedy against the sureties upon the appeal before resorting to his remedy against the land under the lien. He did neither. He assigned the judgment to parties who, after an action had been brought against the sureties upon appeal, in turn assigned it to Wagner, and Wagner, as assignee of the judgment, released these sureties. By doing so he cut off those who succeeded to the interest of Burr, from any remedy by subrogation or otherwise, against these sureties, if the land, to the ownership of which they have succeeded should be taken to satisfy the judgment, in the enforcement of the lien. Under those circumstances it would be inequitable to allow Wagner to sell the land under the execution, and the plaintiff, therefore, is entitled to the injunction prayed for.

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PEOPLE *on the relation of* MARTIN *against* EARLE.

*Supreme Court, First Department, First District;
Special Term, July, 1874.*

MANDAMUS. — AUDIT BY SUPERVISORS. — AUDIT BY
COMPTROLLER AND AUDITOR.

Since the act of 1870 (*Laws of 1870*, ch. 190), county charges audited by the supervisors of New York can not be paid until the vouchers therefor have been examined and allowed by the auditor and approved by the comptroller.

But where a just claim has been audited and the amount fixed by the supervisors, the auditor and the comptroller can not refuse to examine the vouchers and approve and allow them if regular and correct. The check interposed by the statute is upon payment without proper vouchers, and does not authorize the comptroller or auditor to review the decision of the supervisors upon the merits of the claim.

The case of *People ex rel. Kelly v. Haws* (12 *Abb. Pr.*, 192 ; S. C., 21 *How. Pr.*, 117), approved and followed, under the act of 1870.

Thus, where the supervisors audited and allowed the claim of the relator as an employee of the county, — *Held*, that the auditor and comptroller could not resist payment on the ground that relator's name was not on the pay-roll for the period of the alleged services, or that he had not been employed by the officers having authority.

Patrick Martin applied to the court for a peremptory mandamus against Abraham L. Earle, the auditor, and Andrew H. Green, the comptroller, of the city of New York. The grounds of the application appear fully in the opinion.

A. R. Lawrence and *Elliot Sandford*, for relator.

E. Delafield Smith, for respondents.

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FANCHER, J.—The relator moves for a mandamus to the auditor, to audit and allow, and for a like writ to the comptroller, commanding payment of, his claim of two hundred and forty dollars, for his compensation as assistant janitor of the new county court-house.

He swears that on May 1, 1870, he was appointed assistant janitor of the new county court-house, by the court-house commissioners, and that his compensation was fixed at three dollars per day ; that he thereupon entered upon the performance of the duties of the position, and faithfully performed the same, to June 1, 1871, when he ceased, because payment for his services was refused.

He further states that he was paid for his services, up to December 1, 1870, and also for the months of February, March, and April, 1871 ; but for December, 1870, and January and May, 1871, he has not been paid.

His affidavit further shows, that on December 9, 1872, the board of supervisors audited and allowed his claim at two hundred and forty dollars, and directed the comptroller to pay the same from the proper appropriation.

It is further alleged in the moving papers, that, of the appropriation for cleaning and supplies for county purposes for the year 1872, there remained unexpended on December 21, 1872, the sum of eighteen thousand one hundred and thirty-two dollars and fifty-two cents, and of the appropriation, for like purposes, for the year 1873, there remained on September 12, 1873, unexpended, eight thousand seven hundred and eighty-three dollars and fifty cents, from which appropriations the relator's claim could be paid ; but, after proper demand, the auditor has refused to audit, and the comptroller has refused to pay the claim.

The auditor, in answer to the relator's affidavit, states, that the relator's name is not on the pay rolls of the

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commissioners of the court-house, for December, 1870, and January and May, 1871; and that he was not recognized by the commissioners as their employee during that time; also, that there is no money in the treasury, appropriated, or legally applicable, to the payment of the relator's claim.

It appears, on reference to the printed proceedings of the supervisors (p. 239) that a special committee was appointed on June 24, 1872, to inquire into and report to the board, as to all claims which may be fairly due for labor of employees, who have actually rendered service in the maintenance of the new court-house, under the direction of the court-house commissioners. On December 9, 1872, the special committee reported that they had adjusted the claims of certain persons who had presented themselves before the committee, and they submitted a resolution that the claims of seven persons, for certain specified sums, among them "Patrick Martin, assistant janitor, two hundred and forty dollars," "for services in the new county court-house, be audited and allowed at the above amounts, and the controller directed to pay them from the proper appropriation." The resolution was adopted by an unanimous vote.

A provision was contained in chapter 590 of the *Laws of 1857*, which is similar to that contained in chapter 190 of the *Laws of 1870*, to the effect that the finance department of the city shall have the like powers and perform the like duties in regard to the fiscal concerns of the board of supervisors, as the department possesses in regard to the concerns of the corporation of the city of New York; and that all moneys drawn from the treasury by authority of the board of supervisors, shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor, and approved by the comptroller.

It has been contended that this statute of 1870, sub-

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stitutes the auditing power of the comptroller for that of the board of supervisors, or is concurrent with it. I do not assent to the proposition.

It must be conceded, that were it not for the statute just quoted, the audit and allowance by the supervisors of a claim, which is a proper and legal county charge, would be conclusive, and the finance department would thereupon be obliged to pay it (1 *Rev. Stat.*, 367, § 4, subd. 2; 1 *Rev. Stat.*, 5th ed. 848; *People v. Lawrence*, 6 *Hill*, 244; *People v. Supervisors of Dutchess*, 9 *Wend.*, 508). But the statutes of 1857 and of 1870, have unquestionably thrown a new safeguard around the treasury.

It is, that all moneys drawn from the treasury by authority of the board of supervisors, shall be *upon vouchers* for the expenditure thereof.

This conclusion is supplied in the present case, by the relator's bill for three months services duly audited and allowed by the supervisors.

In this case, the auditor has not examined and allowed the voucher, nor has the comptroller approved of it. Such audit, allowance and approval are essential prerequisites to the payment of the claim (*People ex rel. Ellis v. Flagg*, 15 *How. Pr.*, 554; *People ex rel. Brown v. Green*, 2 *Supreme Ct. (T. & C.)*, 18, 23).

Yet where the relator has been properly employed, has rendered the services required, and his claim has been audited, approved and ordered to be paid by the board of supervisors, he has not only a just claim against the county, but a right to have his voucher audited, allowed and approved, and to have his claim paid by the finance department. The case last cited is authority for such proposition.

If the case of *Ellis (supra)*, be supposed to be an authority against the proposition, it may be answered, there is a later authority in favor of it (*People ex rel. Brown v. Green. supra.*

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Judge COMSTOCK, in *People v. Flagg* (17 N. Y., 588), in relation to a claim against the city, said: "the comptroller could not be compelled to draw his warrant until the claim was audited, according to law. The due employment of the relator by the common council, or their recognition of his services, *gave him a just claim against the corporation*, and a right to have his account audited in the manner provided." "The adjustment of the amount belonged to the auditing bureau in the department of finance, and if that department or bureau should refuse to audit it, a mandamus would be an appropriate remedy to compel them to do so."

"When the claim is thus audited, it is presumed that the comptroller can be compelled by mandamus to draw his warrant for the sum allowed."

The reasoning of this decision is consistent with just principle, and is applicable to the present case. The auditing bureau in the finance department can not arbitrarily refuse to examine and approve the proper voucher for an audited claim, nor can the department refuse to approve or pay such a claim. The auditing bureau can not reverse the action of the supervisors.

When the amount has been ascertained and fixed by the board of supervisors, and the services for which the claim was made, have been rendered to the county, it is not competent for the auditor to refuse to audit the voucher, nor for the comptroller to refuse to approve it, or pay the claim.

The intention of the statute plainly is not to substitute the auditor for the supervisors; but it is to grant to him power to audit the voucher for claims on the treasury, so that he may examine and ascertain whether they have been audited and allowed by the supervisors. If so audited, the voucher thereof should be produced to the finance department. There may be an audit and allowance by the supervisors, where the amount has

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not been extended ; *e. g.*, their audit of a janitor's claim may fix his compensation at a specified sum per month, for certain specified months.

The auditor's duty would be to extend or state the aggregate sum allowed to the claimant, so that the summation of the claim should appear and the voucher be audited at the proper sum ; but he clearly would have no power to change the rate to another sum per month, nor to refuse to audit the voucher at all.

The board of directors is by law charged with the management of the affairs of a corporation, as supervisors are of the affairs of a county.

Should the directors employ a janitor, fix his salary, and, after a term of his service, audit his bill, and direct that it should be paid, would it be contended that an auditor of the vouchers for claims against the corporation, and its cashier, though the former were empowered to audit the vouchers, and the latter to approve the same, could overrule or reverse the action of the directors as to the merits of the claim.

The language of Judge Comstock would be applicable to such a state of facts in respect of a county charge. Should the auditing bureau refuse to audit, or the disbursing officer refuse to pay, "a mandamus would be an appropriate remedy to compel them to do so."

In *People ex rel. Kelly v. Haws* (12 *Abb. Pr.*, 192 ; S. C., 21 *How. Pr.*, 117), it was held that the provisions of the act of 1857 did not give the comptroller power to examine and disallow county charges, which had already been examined and allowed by the board of supervisors ; and that the power in respect to such claims was limited to the examination of the vouchers. That decision is sustained by the literal and grammatical construction of the law of 1870.

The language is "all moneys drawn from the treasury by authority of the board of supervisors, shall be upon

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vouchers for the expenditure thereof, examined and allowed by the auditor, and approved by the comptroller."

That is, when the board of supervisors, by the authority vested in them, have ordered a county charge to be paid, there shall be presented to the auditor the proper voucher for the expenditure, which he shall examine, and, if sufficient, shall allow, and the comptroller shall approve of the same before the money is paid. The check intended by this statute is one to prevent payment without proper vouchers.

It certainly was not the intention of the statute to substitute a new government in county affairs, or make the board of supervisors subordinate to an auditor, or to the fiscal officer of the treasury.

As was well observed by Mr. Justice SUTHERLAND, in the case last cited, "the discretionary nature of the power vested in the board of supervisors to examine, settle and allow all accounts chargeable against the county, would appear to be inconsistent with a right on the part of their fiscal agent, or disbursing officer, to question the regularity or propriety of the exercise of their discretionary power."

See also, *People ex rel. Brown v. Green*, above cited. In the *People v. Supervisors of Delaware County* (45 N. Y., 199), it was held, that charges for services rendered to the county, "could be collected in one way only. The account of them must be presented to the board of supervisors of the county, which alone has the power to examine, settle and allow, and to raise the money by tax with which to defray the same."

It was also said, in that case, "the court has the power to decide whether a rejected claim is a legal claim against the county; and if it be a legal claim, it may instruct and guide the board of supervisors by *mandamus*, in the execution of their duty."

The board of supervisors derive their powers of local

legislation and administration from the constitution and laws of the State ; and their action, as to county affairs, within the limits of their jurisdiction, is not subject to revision by the fiscal officers of the treasury.

Sec. 17 of art. 3, of the constitution, provides : " The legislature may confer upon boards of supervisors of the several counties of the State, such further powers of local legislation and administration as they shall from time to time prescribe." Among the general powers conferred by statute on boards of supervisors, it is provided (in 1 *Rev. Stat.*, 5th ed., p. 848), that they shall have power " to examine, settle, and allow all accounts chargeable against such county ; and to direct the raising of such sums as may be necessary to defray the same."

Boards of supervisors in auditing and allowing accounts, are limited to the powers conferred upon them by statute ; but, if the subject matter of the account be within their jurisdiction, and they allow it, the county treasurer has no right to refuse payment on the ground that the allowance was for too much, or was made upon insufficient evidence.

This principle has been deliberately decided (*People ex rel. Merritt v. Chamberlain* of N. Y., 6 *Hill*, 244 ; *People ex rel. Onderdonk v. Supervisors of Queens Co.*, 1 *Hill*, 195, 200).

Their act in examining and allowing accounts chargeable to the county, is a judicial act, and their decision is binding upon all parties concerned (*People v. Stocking*, 50 *Barb.*, 573 ; S. C., 32 *How. Pr.*, 48 ; *Weaver v. Deafendorf*, 3 *Den.*, 117 ; *Chase v. County of Saratoga*, 33 *Barb.*, 603 ; *People v. Supervisors of Livingston*, 26 *Barb.*, 118).

If their decision be wrong, it can only be reviewed by a court of competent jurisdiction. It is not subject to revision by a fiscal officer of the treasury.

I, therefore, think that the claim of the relator, when

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it was examined, audited and allowed by the board of supervisors, and was by them ordered to be paid, became a legal and valid liability against the county. A fiscal officer, can not thereafter become recusant, and refuse to audit the voucher or to pay the claim.

When the supervisors have decided that the relator, as an employee of the county, had performed services for which he was entitled to be paid two hundred and forty dollars, it is no answer for the finance department to return that the name of the relator was not on the pay roll for the three months of such services, nor that the commissioners of the court-house did not recognize him.

The technical omission of his name on the pay roll is of no importance, provided he actually rendered the service for which he was employed, as the supervisors have adjudged he did ; and the alleged want of recognition by the commissioners of the court-house is answered by the decision of the supervisors adjudging that the relator performed the duties of his appointment for the time mentioned.

The auditor states, in his affidavit, "that there is no money in the treasury appropriated or legally applicable to the payment of the relator's claim."

It is shown by the relator's affidavit, and not denied, that an unexpended balance of eighteen thousand one hundred and thirty-two dollars and fifty-two cents remains in the treasury for cleaning and supplies for county purposes for the year 1872, and an unexpended balance of eight thousand seven hundred and eighty-three dollars, on September 12, 1873, for like purposes, out of which balances of appropriations the relator's claim can be paid.

It is, therefore, only a legal conclusion of the auditor to assert that there is no money in the treasury appropriated or legally applicable to the payment of the relator's claim.

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The fact is not denied that moneys are in the treasury, from which the claim can properly be paid, and the relator's affidavit specifies the fund.

The motion for a mandamus to the auditor to audit the voucher, and to the comptroller to approve the same and pay the claim should be granted. The order to be settled on two days' notice.

DAVIS *against* THE SOCIETY FOR PREVENTION OF CRUELTY.

New York Common Pleas; Special Term, May, 1874.

INJUNCTION.—CRUELTY TO ANIMALS.—CRIME

Under *Laws of 1866*, ch. 682, and *Laws of 1867*, ch. 375, § 1, dislocating the limbs of animals to be slaughtered, while they are yet alive, and plunging them while yet alive in boiling water, are criminal offenses; and if committed in the presence of a duly designated officer of the American society for the prevention of cruelty to animals, under *Laws of 1867*, ch. 375, § 8, and *Laws of 1766*, ch. 469, § 7, subject the offender to arrest without a warrant.

An injunction should not be granted, restraining arrests by such officers until a decision in a court of justice as to the alleged cruelty of a method of treating animals, especially in a case where the persons so arrested, if aggrieved, have an adequate remedy at law, and the pecuniary responsibility of those making such arrests is unquestioned.

Where a preliminary injunction had been granted in such case,—*Held*, that it should be dissolved.

Edward W. Davis, and others, brought an action in this court against the American society for the prevention of cruelty to animals, and Henry Bergh, for an in-

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junction against making arrests under the circumstances which appear from the pleadings and opinion below.

The complaint (verified January 9, 1873) was to the effect that the plaintiffs are engaged in the business of slaughtering hogs at an abattoir in West 39th-street, New York, and are jointly interested therein, and have permission from the board of health of said city to carry on said business, and have complied with all the regulations and ordinances of said board and of said city, and of the laws of this State in regard to said business. That they have at considerable expense constructed said abattoir in the most improved manner for conducting said business with dispatch. That the method is to pass a chain around one of the hind legs of the animal, suddenly raise it from the ground by means of a drum or pulley and then immediately stick or stab it in the throat with a sharp knife, producing almost instantaneous death. That said method is the most humane and expeditious that has yet been adopted, causes speedy and almost painless death, drains the carcass almost entirely of blood, thus improving the wholesomeness and quality of the food, and the market value thereof, without bruising, injuring or discoloring the flesh of the animal. That the defendant the American society for the prevention of cruelty to animals, was incorporated by the legislature April 10, 1866, and Henry Bergh is the president thereof. That Bergh on January 6, 1873, came to said abattoir and announced that plaintiffs and all others there engaged, must discontinue the slaughtering of hogs in such manner, and that he would not allow said business to be thus carried on, and thereupon arrested one of the plaintiffs and one of his employees for alleged cruelty to animals, and asserted that thereafter, he would arrest all persons engaged in said business and stop the same as often as he found plaintiffs conducting it in manner aforesaid. That

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plaintiffs make contracts for the sale of said animals before they are slaughtered, and that any interference with their business as threatened, would work irreparable injury and loss to them, preventing them from fulfilling their contracts, depriving them of the services of their skilled workmen, &c. That for an action to be brought by each plaintiff and workman for each arrest, would cause a multiplicity of actions and entail great expense, without affording adequate compensation for the damage sustained. Plaintiffs then demand that defendants, their officers, agents, &c, be perpetually restrained and enjoined from interfering with plaintiffs' business, in any way, or with their employees, until final judgment in the matter. Several affidavits are annexed to the complaint, corroborating the material facts therein stated.

The answer (verified March 3, 1874), denies all the material allegations in the complaint, and also that plaintiffs have complied with the law, but on the contrary avers that plaintiffs, in the prosecution of their business, have violated and do constantly violate the provisions of an act entitled, "An act better to prevent cruelty to animals," passed April 19, 1866, and also of the act entitled "An act for the more effectual prevention of cruelty to animals," passed April 12, 1867. That the said business conducted by the plaintiffs has regard more to the speed with which it can be accomplished, than the comfort of or the cruelty to, the animals, for the benefit of whom said statutes were enacted, Defendants aver that said animals are needlessly tortured and tormented by the mode of slaughtering adopted by plaintiffs. That each animal, by means of an iron chain fastened around its ankle, was raised by a pulley to a floor above, and in some instances four stories above the pen in which it was confined, thereby dislocating its leg, was then stabbed in the throat, and immediately thereafter, while yet living, plunged in a

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cauldron of boiling water. That defendants requested plaintiffs to use a wide leather strap in raising said animals, secured around both legs instead of one, and to allow life to become extinct before plunging them into boiling water ; to which plaintiffs consented and agreed. Defendants further aver that said society is charged with enforcement of all laws of this State for the protection of, and prevention of cruelty to animals, by the arrest, conviction and punishment of all violators thereof, and that the execution of said laws has been intrusted by said society to its president Henry Bergh (the defendant) in which relation and capacity he acted in the alleged interference with plaintiff's business.

A preliminary injunction having been granted, a motion was made to continue such injunction.

The affidavits of the defendant Bergh and two police officers were read, corroborating said answer, and counter affidavits read and submitted on the part of plaintiffs, in denial of their violation of the law.

A. *Oakey Hall*, for the motion.—I. the plaintiffs' method of slaughtering hogs is a very usual one, and their business should not be interfered with by the society and Mr. Bergh, until after a jury have, by verdict, pronounced it cruel.

II. The defendants although *ex colore* public officers, have no right, on Mr. Bergh's interpretation of the law and the acts in question, to proceed summarily and without warrant, and disturb a legitimate business (*High on Injunctions*, § 796; *U. S. v. Duluth*, 1 *Dillon C. Ct.*, 469).

III. Proceedings at law for the damage sustained would involve a multiplicity of suits. The application is therefore within the scope of equity jurisdiction.

IV. The sanitary considerations set up by the plaintiffs' affidavits are not met. Assuming that the killing is in a degree cruel (and all killing is cruel, per

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haps), the maxim *salus populi est suprema lex* should govern, and if the method adopted be the most healthful, that should be paramount.

Elbridge T. Gerry (with whom was *Ambrose Monell*), for the defendants, opposed.—I. The business of the plaintiffs is a public nuisance, and not entitled to any protection in equity, upon the facts shown (*Brady v. Weeks*, 3 *Barb.*, 157; *Harris v. Thompson*, 9 *Id.* 364).

II. The defendants, in enforcing the laws against cruelty, act as public officers, and are entitled to protection as such. Injunctions to paralyze their efforts will not be granted (*Stage Horse Cases*, 15 *Abb. Pr. N. S.*, 51, and authorities cited).

III. This suit is anomalous. It is an attempt to prevent by an injunction in equity, the criminal prosecution of an offender, until the court of equity shall itself decide whether such offender has been guilty of any offense. In other words, a criminal, fearing prosecution in a criminal court, applies to a court of equity, to try the issue, and meanwhile, to restrain the officers of the law from proceeding according to law.

IV. The preliminary injunction was improvidently granted, and should be vacated, with costs.

LARREMORE, J.—In this case an injunction is sought to be maintained against a corporation and its ministerial officer, whose rights and powers are conferred by statute. Chapter 682 of the *Laws of 1866* provides that every person who shall by his act or neglect maliciously kill, maim, wound, injure, torture or cruelly beat any horse, &c., or other animal, shall, upon conviction, be adjudged guilty of a misdemeanor.

The defendant, the American society for the prevention of cruelty to animals, was incorporated by an act of the legislature of this State, passed April 19, 1866 (*Laws of 1866*, ch. 469), and by section 7 of said

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act, the police force of the city of New York, were directed as occasion should require to aid said society, its members or agents, in the enforcement of all laws, which had been or might thereafter be enacted for the protection of dumb animals. Another act was passed by the legislature, April 12, 1867 (*Laws of 1867*, ch. 375), which provides (§ 1) that if any person shall overdrive, overload, torture, torment, or needlessly mutilate any animal, or cause the same to be done, &c., every such offender, shall, for every such offense, be guilty of a misdemeanor.

Section 8 of said act, authorizes any agent of said society, upon being designated thereto by the sheriff of any county in this State, to make arrests within said county, and bring offenders violating the provisions of said act, before any court or magistrate having jurisdiction thereof.

There is no pretense that said society, and Henry Bergh, its president, are not authorized to enforce the observance of the statutes above mentioned within the city and county of New York.

The defendants being thus clothed with proper legal authority, their official action should not be interfered with or restrained, unless it be injurious and wrongful in its nature, especially in a case where the parties aggrieved have an adequate remedy at law, and the pecuniary responsibility of the defendants is unquestioned (*Sterman v. Kennedy*, 15 *Abb. Pr.*, 201; *Moore v. Board of Commissioners of Pilots*, 32 *How. Pr.*, 184; *Gilbert v. Mickle*, 4 *Sandf. Ch.*, 357; *Prendorill v. Kennedy*, 34 *How. Pr.*, 416).

The real issue in this case is not whether the mode of slaughtering animals, as set forth in the complaint, is the best and most expedient, but whether or not, independent of such mode, wanton acts of cruelty are allowed and practiced, such as dislocating the limbs of the animals slaughtered, and plunging them while yet

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alive in boiling water. Such acts are made criminal offenses by statute, and if committed in the presence of a duly designated officer of said society subjects the offender to arrest without a warrant (Broadway Stage Company v. American Society for the Prevention of Cruelty to Animals, 15 *Abb. Pr. N. S.*, 51). For such violation of the statute, the defendants claim the right of arrest, and the plaintiffs ask the preventive process of the court.

I have not been able to find, nor have I been referred to any case which authorizes such a remedy. To grant it, would be assuming the position that the plaintiffs would not, during the pendency of this action, violate the statutes in question, and, therefore, the defendants whose official duty it is to prevent and punish such violation, must be restrained in the exercise of rights expressly enjoined upon them by the statute.

The right to an injunction in any case is not *ex debito justitiæ*, but is always addressed to the sound discretion of the court. It would be a wide stretch of judicial discretion to inhibit a public officer, for any time from arresting, and prosecuting offenders against a criminal statute. Even in actions purely civil, an injunction would not be granted against a merely apprehended trespass (Mayor of N. Y. v. Conover, 5 *Abb. Pr.*, 171; N. Y. Life Ins. & Trust Co. v. Supervisors of N. Y., 4 *Duer*, 192; Chemical Bank v. Mayor, &c., 12 *How. Pr.*, 476; Lewis v. Oliver, 4 *Abb. Pr.*, 121; Wilson v. Mayor, 4 *E. D. Smith*, 675).

Plaintiffs do not seek to restrain a trespass affecting a corporate franchise, but ask relief against acts which must necessarily involve individual misconduct. For this, their remedy at law is adequate and complete, and the defendants, upon whom the law has devolved most important trusts, should be left to an unrestrained ex-

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ercise of their lawful powers, subject only to a right of action for their abuse.

Injunction dissolved, with costs, to abide event of suit.

CHALLIS v. OSBORN.

New York Superior Court, Special Term; May, 1874.

PLEADING.—TIME OF FALSE REPRESENTATIONS.

In an action for deceit, by representations alleged to have been made about sixteen months before action brought,—*Held*, that an allegation in the complaint that plaintiff had since ascertained that defendant's representations were false, without stating the time of the discovery, was obnoxious to a motion to make more definite and certain.*

Luther C. Challis sued in this court Charles J. Osborn, and others, on the grounds set forth below.

The complaint alleges that the plaintiff, induced by the defendants' representations, made about January 27, 1873, bought one thousand shares of Hannibal & St Joseph Railroad stock; that he has since ascertained that these representations were false, and known so to be by the defendants. The prayer for relief is that the purchase be set aside, and that plaintiff recover as damages the price paid, with interest from day of purchase.

This is a motion to make the complaint more definite and certain, by stating when these representations, made about sixteen months ago, were ascertained by the plaintiff to be false.

* See also *McCreight v. Stevens*, 1 *Hurlst & N.*, 454; *Code of Pro.* § 158.

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Shearman & Sterling, attorneys for defendant Chapin

John W. Sherling, of counsel,—cited, *Chesbrough v. N. Y. & Erie R. R.*, 13 *How. Pr.*, 557 ; S. C., 26 *Barb.*, 9 ; *Blanchard v. Strait*, 8 *How. Pr.*, 83 ; *Fisher v. Fredenhall*, 21 *Barb.*, 83 ; *Wheaton v. Baker*, 14 *Id.*, 597 ; *McCarty v. Ely*, 4 *E. D. Smith*, 375.

Luke A. Lockwood, plaintiff's attorney.

VAN VORST, J.—I think the plaintiff should state in his complaint when he discovered the fraud on which he relies to annul the sale. In that respect the complaint should be made more definite and certain.

Motion granted.

BONNELL *against* WHEELER.

*Supreme Court, Third Department, Third District,
General Term ; March, 1874.*

JOINDER OF ACTIONS. — MANUFACTURING, &c. CORPORATIONS.—INDIVIDUAL LIABILITY OF STOCK-HOLDERS AND OFFICERS.—PLEADING.—
ASSIGNMENT OF CAUSE OF ACTION.

In an action to charge the officers of a manufacturing, &c. company, individually, for a debt of the corporation, a cause of action for not making the report within the twenty days prescribed by law, may be joined with a cause of action for making a false report, though both refer to the same year.

Such causes of action "arise out of the same transaction, or transactions connected with the same subject." The subject of action is

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the plaintiff's demand against the corporation, and the transactions connected with it, are defendant's unlawful acts.*

But if it appear that the false report was not signed by all the defendants who are charged with omission to make report, there is a misjoinder of actions, by reason that the causes do not affect all the defendants.

A cause of action against the officers of a corporation, to charge them individually with its debt, is assignable.†

Samuel Bonnell, Jr. and Eli W. Blake respectively brought two several actions in this court, against Geo. M. Wheeler, Chester Griswold, Jacob Hoysradt and others, as the surviving trustees of the Iron Mountains Company of Lake Champlain, formed in August, 1869, under the act of the legislature of New York, entitled, "An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, and the acts amendatory of the same. The plaintiff Bonnell claimed the sum of five thousand five hundred and eleven dollars sixty-six cents, by virtue of an assignment to him by the Birmingham Iron Foundry, of a demand for work and labor done, and materials furnished by it for the Iron Mountains Company. The plaintiff Blake claimed the sum of one thousand two hundred and forty-seven dollars forty cents as originally due him in his own right from the Iron Mountains Company.

The first counts of the complaints respectively alleged the organization of the said Iron Mountains Company as aforesaid; that the defendants, and said John A. Griswold (since deceased), were duly appointed and acted as the trustees of said company for the first year; that during that period they omitted, to make, publish, or file a report within

* Compare *Sanborn v. Lefferts*, p. 42 of this vol. ; *Hall v. Sigel*, 13 *Abb. Pr. N. S.*, 178.

† Compare *Hall v. Sigel*, 13 *Abb. Pr. N. S.*, 178.

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twenty days from January 1, 1870, pursuant to the provisions of section 12 of the above-mentioned act, by means of which alleged omission the defendants became liable to pay the plaintiffs' claims, respectively stated in said counts.

The second counts, after referring to the allegations of the incorporation of said company, in the first counts, respectively set forth a copy of the charter, or certificate of incorporation thereof, and state that the said defendants and the said John A. Griswold, while acting as such trustee as aforesaid, did on January 13, 1870, make and file in the office of the clerk of the county of Essex, a certificate or report, a copy of which is annexed to and made a part of the complaints, and which it is averred the said defendants and the said John A. Griswold, in said month of January, 1870, published in the *Elizabethtown Post*, a newspaper published in said county of Essex, the said certificate or report being, as said plaintiffs respectively allege, false in a material representation, and known by the said defendants, and the said John A. Griswold, so to be, namely, in stating that the capital stock of said company had been paid in full, when, as the plaintiffs respectively aver, such was not the fact; and that, therefore, by force of section 13 of said act, the said defendants also became liable to the plaintiff, to the amount of their respective claims.

The third counts, after referring to the incorporation of said company, and that the defendants and said John A. Griswold, were the trustees thereof, as aforesaid, respectively set forth, that prior to the organization of the said company, the said defendants and the said John A. Griswold entered into an alleged fraudulent scheme, combination and conspiracy, to form said corporation as it was formed, and to fraudulently cause to be transferred thereto certain lands owned by a corporation styled the "Kingdom Iron Ore Company," in which com-

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pany it is alleged the defendants and said John A. Griswold were interested as stockholders and officers, and to have the stock of the new company issued to an amount largely in excess of the value of said lands, and to have the whole of said stock paid to, or for the benefit of said Kingdom Iron Ore Company, in part payment for said lands. The third counts then proceeded with general allegations of acts and doings on the part of said defendants and said Griswold, in furtherance of said alleged scheme and conspiracy, closing by alleging that the said alleged omission set forth in the first counts, and the alleged making of said alleged false report set forth in said second counts, are and were part and parcel of said alleged scheme or conspiracy, by means of which alleged doings it is claimed the defendants became liable to pay the claims of the plaintiffs respectively.

The said plaintiffs also each brought another action, on the same demands respectively, against Chester Griswold, John W. Griswold and Elizabeth H. Griswold, as executors of John A. Griswold, deceased, but in his lifetime a trustee of the said corporation. The complaints in these actions contained substantially the same allegations as those of the first two counts of the two former actions above described, respectively, but omitted those of the third counts.

The defendants demurred to all the complaints upon the grounds stated in the opinion below, and now appeal to the general term from Mr. Justice BOCKES's orders overruling the demurrers.

W. C. Holbrook, for the defendants, appellants.

A. Pond, for the plaintiffs, respondents.

BY THE COURT.*—MILLER, P. J.—In the first two

* Present, MILLER, P. J., and BOARDMAN, J.

actions, I think that the first and second causes of action were properly united. Each of them was for a liability somewhat in the nature of a statute penalty, and virtually an action on contract for the recovery of money (*McCoun v. N. Y. & H. R. R. Co.*, 7 *Lans.*, 75; overruled, however, as to form of summons, in 50 *N. Y.*, 176). They were therefore, properly joined under section 167, sub. 2 of the Code.

The fact that one of the causes of action is for not making a report within the twenty days as required by section 12 (*Laws of 1843*, ch. 40), and the second for making a false report, does not, I think, alter the case. Each one of the counts contains a separate and an independent cause of action, and either of them may be upheld, if the evidence upon a trial warrants it.

They are not necessarily inconsistent with each other or contradictory. Even if a report be filed, which is false within section 15 of the act cited, it by no means follows that there has been a compliance with section 12. A report which is false, can scarcely be said to be a report which is required by section 12, and I am inclined to think that where such is the case, an action may be upheld under section 12, if for any reason the proof upon a trial would not warrant a judgment under section 15.

Nor, in my opinion, is there any question but that each of these causes of action may arise out of "the same transaction or transactions connected with the same subject of action," within section 167, subdivision 1. The subject of the action of the plaintiff, is the debt, and the transactions connected with it are the unlawful acts of the defendants. These acts arise out of transactions which relate to, and form a part of the subject of the action.

If, in accordance with the opinion of *Adams v. Bissell* (28 *Barb.*, 386), we disregard the last clause of sub-

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division 1 of section 167, which I am not prepared to do, I am nevertheless satisfied that each of the causes of action arises out of the same transaction, and may be maintained. If these views are correct, the first ground of demurrer can not be upheld.

It is insisted that there is a misjoinder of the first and second causes in the first two actions, because they do not affect all the defendants, viz. : Hoysradt, Corning and Burleigh, who were not signers of the alleged false report set forth in the second cause of action. And that there is a misjoinder of the third cause of action therein with the first and second, for the same reason. These grounds are stated also in the second and sixth grounds of demurrer of the defendants Wheeler and Griswold respectively, and in the separate demurrer of the defendant Hoysradt.

The Code, section 167, provides that the causes of action united "must affect all the parties to the action," and the objection of a misjoinder may be taken advantage of by demurrer (*Warth v. Radde*, 18 *Abb. Pr.*, 396; *S. C.*, 28 *How. Pr.*, 230; *Smith v. Geortner*, 40 *Id.*, 185; *Hess v. Buffalo & N. F. R. R. Co.*, 29 *Barb.*, 391; *Palmer v. Davis*, 28 *N. Y.*, 246).

It is claimed by the plaintiffs that the complaints allege that all the defendants did sign the report and the demurrers admit the allegation to be true.

The second count in the two cases avers, that the company was duly organized and incorporated as stated in the first count; that the defendant and Griswold were duly named as trustees, and while such trustees, and acting as such, having accepted as such, the "defendants and said John A. Griswold on January 13, 1870, made and filed in the Essex county clerk's office," "a certificate or report, a copy whereof is hereunto annexed marked B." It also alleges that "said certificate and report was the only

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report made, filed and published ; that said report was false," &c. stating wherein.

It then proceeds to state "that said defendants and the said John A. Griswold signed said certificate, knowing it to be false as hereinbefore stated," &c. The certificate annexed does not contain the names of the three defendants hereinbefore mentioned. The allegation that they did sign, refers to "said certificate," meaning the one annexed, which negatives the allegation that such was the fact.

If this last allegation can be considered as in conflict with what had previously been averred, then the reading of the report or certificate annexed must, I think, determine how the fact is.

And although verbally a contradiction, yet as it refers directly to the report, the allegation must be considered as confirmed and restricted to what appears upon the face of the certificate, a copy of which is annexed, that is ; that Griswold and others did sign it, but that the other three defendants did not. It appears then that the report and certificate set forth was not signed by either of them, whence they could not be held responsible for its being false. It is no answer to say that the complaints only purport to have annexed to them copies of the report and not of the signatures, for it would lack the essential qualities of a report unless it is signed. Besides the names attached constitute a part of the report ; are first mentioned at its commencement as being trustees ; and the report purports to have been sworn to by each one of the signers before a notary. It is plain, therefore, that there is a misjoinder of actions as to the first and second causes of action, and also of the third, which is based on the first and second, and in this respect the demurrers are well taken.

The defendant's counsel further insists, that the complaint in the Bonnell case does not state facts sufficient

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to constitute a cause of action, because it shows upon its face that Bonnell was not an original creditor, but derives his claim only by assignment or transfer from the "Birmingham Iron Foundry." In other words that the claim was not assignable by the trustees of the "Birmingham Iron Foundry," so as to transfer to Bonnell any cause of action against the defendants which arises under sections 12 and 15 of the manufacturing act, by virtue of which a recovery is claimed (*Laws of 1848*, ch. 40, p. 54, 57.)

The provisions referred to provide for a liability of trustees or officers of a company for all debts existing or contracted without limiting or restricting such liability to the creditor alone, and extend the remedy, I think, for the collection of the debt, against the trustees or officers who neglect their duty and fail to comply with the law.

They do not change the nature of the debt for which the company was originally, and continues to be, liable, nor invest it with a character which prevents an assignment of the same, which carries with it all the incidental remedies given by statute.

The act embraces "All the debts of the company," which, I think, means debts due not only to the original creditor, but to such person as may be entitled to the same by virtue of a lawful assignment.

Regarding the action as brought upon the contract, and the remedy under the statute as merely incidental, I am inclined to think that it stands precisely in the same position as any other action of a similar character, which has been lawfully transferred to another party. But even if this position may be doubted, the plaintiffs' cause of action may be considered as embraced within the rule laid down in some of the reported cases, to the effect that a cause of action against a vendee of land for fraudulent representations as to an incumbrance, or an action for fraudulent representations in

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obtaining money or property, survives to and against the personal representatives, and an assignee may sue thereon (*Haight v. Hoyt*, 19 *N. Y.*, 564; *Byxbie v. Wood*, 24 *N. Y.*, 607; *Graves v. Spier*, 58 *Barb.*, 349, 385; *Johnston v. Bennett*, 5 *Abb. Pr. N. S.*, 331).

Although the first and second causes of action set forth in the plaintiff Bonnell's complaint, do not perhaps directly show an injury arising from the defendants wrongful acts, or which tends to affect, impair or diminish the estate of the "Birmingham Iron Foundry," or of the plaintiff, yet it is quite apparent that the unlawful acts of the defendants may have such an effect.

The law declares that such an injury may have accrued from the facts stated, and it is a fair and legitimate inference, I think, that the failure of the defendants to comply with the provisions of the statutes cited, may have occasioned, and did cause such injury, and seriously affected and impaired the property and estate of the plaintiff, or his assignor.

It is also a presumption of law that the debt was contracted, in the first instance, and an assignment of the same made, with a full knowledge of the remedies under the statute, and with entire reliance upon the same.

In my opinion, the case now presented, bears no analogy to an action brought to recover damages for personal injuries, which is not assignable, for the reason that no one has a property in the personal sufferings of another, and, therefore, the acts complained of can not injuriously affect, impair, or diminish his estate.

The cause of action here clearly goes beyond the person. It is a debt incurred for work and labor performed, and materials furnished, which if not paid, diminishes the property of the creditor or of his assignee.

If the causes of action are regarded as brought for mere penalties, then some of the later cases hold, that the right of action is assignable, and not a mere personal

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privilege (*Meech v. Stoner*, 19 *N. Y.*, 26; *McDougall v. Walling*, 48 *Barb.*, 464).

As the statute does not forbid the assignment of a claim like that for which the plaintiff seeks to recover, but appears to favor the right to assign, and as such right is not in conflict with any principle of law, and is upheld by the reported cases, my conclusion is that the grounds of demurrer last considered are not well taken except as to the defendant Hoysradt, who, as we have already seen, was not a signer of the certificate, and, therefore, can not be made liable under the second cause of action.

There was no misjoinder of the third cause of action with the first and second causes of action, so far as the substance of the same is concerned, and I see no difficulty in regard to them. The question presented in regard to this branch of the case was passed upon in *Arthur v. Griswold* (55 *N. Y.*, 400), and it is there held that, although the causes of action are different, they are to be deemed properly united, and they relate to the same general transaction (See opinion of CHURCH, Ch. J.).

In the third and fourth actions the complaints against the executors, are of the same general character as in the first and second actions, except that the cause of action alleging a conspiracy, being the third cause of action in these two cases, is omitted.

The observations already made cover all the objections taken, and as none exist which are fatal to a recovery, the demurrer must be overruled as to these.

In the first and second actions the order appealed from must be reversed, with ten dollars costs, and the defendants are entitled to judgment on the demurrer, with leave to the plaintiff in each to amend, upon payment of costs, within twenty days of service of a copy of the order herein.

In the third and fourth actions, the order must be affirmed, with ten dollars costs. Judgment must be

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ordered for the plaintiffs, upon the demurrer, with leave to the defendants to answer within twenty days after service of a copy of the order herein, and upon payment of costs.

HOAG *against* LAMONT.

City Court of Brooklyn, General Term ; 1874.

JURISDICTION.—BROOKLYN CITY COURT.—CORPORATION.—PRINCIPAL AND AGENT.

The city court of Brooklyn acquires jurisdiction by the appearance, generally, without objection, of the defendants, though they are not residents of Brooklyn, in cases where it has jurisdiction of the subject-matter of the action, and where the appearance is with full knowledge of all the facts ; as where the complaint was served with the summons, on defendants, before the appearance.*

It seems, that the residence in the city of Brooklyn, of one only of defendants jointly sued, gives that court jurisdiction as to all the parties.

The patentee of a process of manufacture, on behalf of himself and two others, all of whom were afterward trustees of a company subsequently formed for carrying on business under the patent, contracted that plaintiff and another should be sole agents in certain States, for the sale on commission of the wares of such company when organized ; that the company should furnish them specified quantities of the wares, or in default thereof pay them quarterly the sums which would be derived from their commissions if the quantities specified were furnished and sold ;—*Held*, that a verbal ratification of such agreement by the president of the company, after the organization thereof, a written recognition of the existence of the agreement and of the amount of commissions due under it by the secretary of the company, the payment of the first installment in lieu of such commissions when due, a verbal promise by the managing trustee and treasurer, that the company should pay the second installment, and the ordinary recognition of them as agents by the company, was sufficient, without a resolution of the board of trustees, or a writing expressly assuming the agreement, to charge the company under it.

* Compare *Sanborn v. Lefferts*, p. 42 of this vol

*Modified
16 Oct. n.s. 369
to ny 96.*

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William H. Hoag brought an action in this court against Charles A. Lamont, Calvin T. Hubbard, Heman D. Walbridge, and William S. Andrews, trustees of the American and European Crystalized Egg Company, to charge them personally with a demand against said company, for the reason that no report was made by the company within twenty days after January 1, 1871, as required by law.

The following facts were proved.

April 22, 1870, the defendant Lamont, patentee of a new process, and contracting in his own behalf and for Hiram Walbridge and the defendant Andrews, executed articles of agreement constituting Anton C. Crondal and John Dreyer, sole agents for any firm or company formed or to be formed to manufacture under the patent, for the sale on commission, the rate of which was specified, of such manufacture, and undertaking that such firm or company should furnish to them specified quantities of the manufacture, or in default thereof pay them quarterly the amounts which would, had the quantities specified been furnished and sold, have accrued to them as commissions.

August 5, 1870, the above-named company was formed for such manufacture and all the defendants signed the certificate of incorporation, and were named therein as trustees for the first year.

The company never furnished the goods called for by the agreement.

Shortly after its organization the president of the company verbally ratified on its behalf the foregoing agreement, and the secretary of the company at the end of the first quarter thereafter, gave Crondal and Dreyer a writing, recognizing the existence of the agreement, and the amount in lieu of commissions, seven hundred and fifty dollars, then due according to its terms, which was paid. Subsequently the managing trustee and treasurer of the company promised that the

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company should pay them the installment in lieu of commissions, for the second quarter, ending December 30, 1870, amounting to one thousand dollars, which was never paid, and is the foundation of this action. Crondal and Dreyer occupied the offices of the company and with the assent of its officers used cards describing them as its agents, and negotiated sales of its manufacture.

In January, 1871, Crondal assigned his interest under the agreement to Dreyer.

In August, 1871, Dreyer recovered judgment in the marine court of the city of New York against the said company for one thousand dollars, the amount of the unpaid installment, and for fifty dollars nineteen cents costs. Execution thereon having been returned unsatisfied, Dreyer, August 11, 1871, assigned the judgment and all the claims on which it was founded to the plaintiff in this action, who sues the defendants as above.

No report of the company was filed in the office of the county clerk as required by law from the date of its organization in 1870 to May 20, 1872.

There was some evidence that the defendant Walbridge resided in Brooklyn in December 1871, when this action was begun. He appeared and answered without objecting to the jurisdiction. The other defendants, who resided without the city of Brooklyn, were served with summons and complaint, gave general notice of appearance, but subsequently set up a want of jurisdiction.

Trial was had in November 1873, before NEILSON, Ch. J., and a jury.

Defendants moved to dismiss the complaint on the grounds.

1. That the court had no jurisdiction.
2. That no cause of action had been made out.

The motion was denied, and defendants excepted.

Defendants' counsel asked the court to charge that an assumption by the company of the above agreement

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must, to be binding upon it, be in writing ; and, also, that a resolution of the board of trustees was necessary to the binding adoption of the contract by the company.

These requests were denied, and exception was taken to such denial.

On verdict for plaintiff, for one thousand one hundred and thirty dollars, judgment was entered for that amount with costs, amounting in all to one thousand five hundred and thirty-nine dollars and sixty-eight cents, and defendants appealed to the general term.

Lewis S. Thomas, attorney for defendants appellant.

Paine & New, attorneys for plaintiffs respondent, on the question of the ratification of Lamont's contract by the company, cited *Hooker v. Eagle Bank*, 30 *N. Y.*, 83; *Phillips v. Campbell*, 43 *Id.*, 271; 17 *Id.*, 453; 42 *Vt.*, 128. And on the question of jurisdiction, *Code of Procedure*, §§ 33, 139; *Laws of 1870*, ch. 470, § 5; *Laws of 1871*, ch. 282; *Porter v. Lord*, 4 *Abb. Pr.*, 43; *S. C.*, 13 *How. Pr.*, 254; *Bates v. Reynolds*, 7 *Bosw.*, 685; *Spyer v. Fisher*, *N. Y. Super. Ct.* (Feb. Gen. Term), 1874; 35 *N. Y. Super. Ct.* (3 *Jones & S.*), 94; *Vose v. Cockroft*, 44 *N. Y.*, 422; *McKeon v. Lee*, 51 *N. Y.*, 482; *Connors v. People*, 50 *N. Y.*, 241; *Clapp v. Graves*, 26 *N. Y.*, 418; *McCormick v. Penn*, 49 *N. Y.*, 308; *Gracie v. Palmer*, 8 *Wheat.*, 699.

BY THE COURT.*—REYNOLDS, J.—We think there was sufficient evidence of the adoption by the company of the contract originally made by Lamont, in anticipation of its formation, and that the plaintiff's assignors were in the employ of the company during the quarter for which a recovery was had. It seems to us that upon the merits the case was properly disposed of by the court and jury.

* Present, McCUE and REYNOLDS, JJ.

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The more serious question is whether this court has acquired jurisdiction of the action.

The action was commenced under the statute of 1871. So far as that statute undertook to confer jurisdiction upon the court by reason of the residence of the plaintiff, it was unconstitutional. Whether the residence of *one* or several *defendants* jointly liable (as in this case) may not be made the ground of jurisdiction, has not, so far as we are advised, been yet decided by the court of last resort, and we do not clearly perceive how such legislation is obnoxious to the condemnation passed upon the act of 1873, by that court.

At the time of the adoption of the present judiciary article of the constitution, the superior court and court of common pleas, in New York city, had jurisdiction in actions, "where one or more of several defendants jointly liable on contract reside, or are personally served with the summons" in said city (*Code*, § 33.)

That jurisdiction was "continued" by the judiciary article, showing that it was not intended, in the adoption of that part of the constitution, to make the courts of this class so strictly local, that they could not in any case send their process outside of their respective cities, and bring non-residents within their jurisdiction.

It would seem then, not to be a violation of the constitution, to confer jurisdiction upon this court where any of the defendants jointly liable should reside in this city, and this at least was done by the act of 1871.

The evidence, however, to show the residence of Walbridge, in Brooklyn, is quite meager, but even if it should be held insufficient, we still think the court acquired jurisdiction by consent.

The defendant Walbridge answered, without raising the question of jurisdiction; and the other defendants appeared generally in the action, previous to the time of answering. We think this was a waiver of the objection. It is now provided by the Code (section 139)

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that "a voluntary appearance of a defendant is equivalent to personal service upon him," by which we understand that it is equivalent to legal effectual service. A voluntary general appearance with full knowledge of all the facts relating to the jurisdiction of the court, is a submission of the person to that jurisdiction, and is effectual, where the court has jurisdiction of the subject-matter. In this case all that was necessary to give the court jurisdiction of the *cause* was residence of the defendants, or service of process within the city. Such service was dispensed with by its equivalent, a voluntary appearance.

It is true that Judge ALLEN says, in *Landers v. Staten Island R. R. Co.* (53 *N. Y.*, 460), "the objection to the jurisdiction was not waived by an appearance in the action, and an answer therein setting up the objection," but this, of course, had reference to the facts of that case. The summons therein was served without any complaint, and there was no appearance beyond a *notice of retainer* and *demand of copy of complaint*. The defendant could not legally know but the action was one of which the court had undisputed jurisdiction. When the complaint was served notifying the defendant of the nature of the action, and showing that the court had not jurisdiction, the defendant answered, setting up that under such circumstances, such a notice and demand could not be held to be a waiver. In the case now before us, the summons and complaint were annexed; and with the whole case before them the defendants gave a general notice of appearance in the action before answering.

It may be that the court of appeals will hold that we have no jurisdiction upon these facts; but we prefer to await that decision rather than go beyond what it has already held in disclaiming a jurisdiction which the legislature has attempted to confer upon us.

The judgment is affirmed, with costs.

Supervisors of Richmond v. Van Clief.

SUPERVISORS OF RICHMOND *against* VAN CLIEF.

*Supreme Court ; Second Department, Second District ;
General Term ; September, 1874.*

APPEAL TO COURT OF APPEALS.—LEAVE TO APPEAL UNDER CH. 332, LAWS OF 1874.

Under chapter 322, of the *Laws of 1874*,—amending *Laws of 1848*, ch. 379 ; *Code*, § 11, and providing that “no appeal shall be hereafter taken to the court of appeals from any judgment or order granting or refusing a new trial where the amount of the judgment or subject-matter in controversy in the action or proceeding does not exceed five hundred dollars, exclusive of the costs therein, unless the general term of the court, from whose decision or determination such appeal shall be taken, shall, by an order to be entered in the minutes, state that there is involved some question of law which ought to be reviewed in the court of appeals,”*—when the amount involved is

* The section contains also this clause: “In actions not founded upon contract, where the judgment appealed from is for the defendant, the amount claimed in the complaint shall be deemed the amount of the subject-matter of the controversy. Nothing in this provision is to apply to actions or proceedings affecting the title to real estate or an interest therein.”

It will be noticed that the act is silent in respect to the appeal of some causes which are not founded upon a pecuniary claim, and some of those in which the pecuniary value involved can not be estimated. In cases of the former nature,—*e. g.*, involving a claim to the guardianship of infants, based not on the pecuniary advantage to accrue therefrom but upon other considerations—it has been held, under the United States acts, which give an appeal where the matter in dispute exceeds a given sum, that an appeal does not lie (*De Krafft v. Barney*, 2 *Black*, 704 ; *Barry v. Mercein*, 5 *How. U. S.*, 103). An appeal in a controversy, as to the appointment of a guardian sought on the ground of the amount involved, has also been dismissed on the ground that the office had no pecuniary value (*Ritchie v. Mauro*, 2 *Pet.*, 243). In a case, however, where the appellant held as a slave, claimed his personal liberty, the court, while holding that the matter in dispute was not susceptible of a pecuniary valuation, sustained jurisdiction of the ap-

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less than five hundred dollars, the defeated parties may apply at any general term in the *department*, at any time within two years from notice of entry of judgment, for an order stating that the case involves questions of law which ought to be reviewed in the court of appeals.

It is not the province of the general term to certify such fact, unless the defeated party applies to the court so to do.

A motion to the general term, for the order, by the party desiring it, is the proper practice.

The supervisors of Richmond county recovered at the Richmond circuit, in April, 1873, in a suit by them against John H. Van Clief, Sr., a verdict for four hundred and sixty-three dollars and ninety-nine cents, subject to the opinion of the court at general term, and the defendant's exceptions were ordered to be heard at general term in the first instance.

The exceptions came on for argument at general term, in February, 1874, and at the general term held in May, 1874, the cause was decided, and the court ordered judgment for the plaintiff upon the verdict, and denied the defendant's motion for a new trial.

In the mean time the amendment to section 11 of the *Code* (chap. 322 of the *Laws of 1874*), was passed, which provides as follows: "No appeal shall hereafter be taken to the court of appeals from any judgment or order granting or refusing a new trial when the amount of the judgment or subject-matter of the controversy in the action or proceeding, does not exceed five hundred dollars exclusive of the costs therein, unless *the general term of the court*, from whose decision or determination such appeal shall be taken, shall by an order, to be entered in its minutes, state that there is involved some question of law which ought to be reviewed in the court of appeals."

peal, and this under a statute, which provided that no appeal should lie unless the amount in controversy was of a certain value (*Lee v. Lee*, 8 *Pet.*, 44).

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The defendant desiring to appeal from the judgment, obtained a stay of proceedings until he could move at the next general term for the required order, and at the general term, in September, 1874, upon the papers and proceedings in the case, made the motion.

It was conceded that the case presented was a proper one to be reviewed in the court of appeals, provided the general term had power to make the order.

Mr. Tompkins Westervelt, for the plaintiff, argued that the court had no power to make the order at this time; that the words "the general term of the court" in the statute, meant that the order must be made *at the same general term* at which the case was decided.

Mr. S. F. Rawson, for the defendant, argued that the words referred to simply meant the general term of the same district; and that the motion for the order might be made and the order granted, at any general term which might be held in the department at any time within the two years allowed by the *Code*, in which to appeal from the judgment, that if this were not so, each party would be compelled to ask the court on the argument, to allow them if defeated, to appeal to the court of appeals, which would be an absurdity; or which would be equally absurd, the general term would be obliged to certify in each case, whether the defeated party desired it or not; that there was or was not some question of law involved, &c.

THE COURT * unanimously held that the application was properly made at this term, and that the court had power to make the requisite order; and the following entry was ordered to be made on the minutes, under the title of the cause.

* Present, BARNARD, P. J., TALCOTT and TAPPEN, JJ.

Dauchy v. Miller.

“It is ordered and stated that there is involved in this action some question of law which ought to be reviewed in the court of appeals, and that this order be entered in the minutes of this general term.”

DAUCHY *against* MILLER.

*Supreme Court, Third Department, Third District;
Special Term, September, 1874.*

DEPOSITION BEFORE REFEREE. — DISCRETION OF
COURT. — AFFIDAVIT. — MOTIONS AND ORDERS.

Subdivision 7, of section 401, of the Code of Procedure,—which provides for compelling a person who has refused to make his deposition at the instance of a party intending to make a motion thereon in a court of record, to make such deposition before a referee,—was not intended to authorize an examination of a witness upon the general merits of a controversy.

The granting of an order for the purpose is in the discretion of the court.

The affidavit, on which such order is asked for, should specify the subject on which the witness was requested to depose, and the facts claimed to be within the knowledge of such witness, and bearing upon the merits of the motion desired to be made.

Where such affidavit did not state the facts supposed to be within the knowledge of the witness whom it was sought to make testify, nor even that the party's opinion that his testimony was necessary, was based on the advice of counsel, the order compelling such testimony was vacated.

On a motion to vacate such an order, objection that the moving papers do not point out particularly the defect complained of, can not prevail, where the order is assailed for insufficiency of the affidavit on which it is founded, since this is matter of substance going to the sufficiency of the whole proceeding.

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Sarah F. Dauchy procured an order of arrest against Thomas S. Miller, in an action against him in this court.

An order was subsequently granted, appointing a referee to take the deposition of Nathan Dauchy, upon the following affidavit.

“SUPREME COURT.

“SARAH F. DAUCHY

“v.

“THOMAS S. MILLER.

“Thomas S. Miller, being duly sworn, says that he is the above-named defendant; that he intends to make a motion to set aside the order of arrest, in this matter, or to increase the amount named in the undertaking given upon procuring the said order; that in order for said deponent to make said motion, it will be necessary to have the affidavit of Nathan Dauchy for that purpose; that to-day deponent applied to said Dauchy to make such affidavit, and said Dauchy refused to do so, and has not yet done so.

“T. S. MILLER.

“Sworn before me, Sept. 7th, 1874,

“WM. H. HOLLISTER, Jr., Notary Public.”

A motion is now made to vacate said order for taking said Dauchy's deposition, on the ground of irregularity, and for insufficiency of the affidavit on which the order was founded.

James Lansing, for the plaintiff, in support of the motion.

E. F. Bullard, for defendant, opposed.

INGALLS, J.—This proceeding is instituted under

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subd. 7 of section 401 of the Code, which provides: "When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpoenaed, and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue." The Code does not prescribe the form of the affidavit, and only in general terms indicates what it must contain to justify the granting of the order. It is obvious this provision of the Code was not intended to authorize an examination of a witness upon the general merits of a controversy. No notice is required to be given to the adverse party, and no cross-examination of the witness is contemplated. It was merely intended to enable a party to secure the affidavit or deposition of a witness upon some subject involved in, and necessary to, a motion in the action. The court is to exercise a discretion in regard to the propriety of granting such an order. The language of the Code is: "Such court may appoint a referee;"—that is, if the facts presented are such as establish the necessity or propriety of such order. Of this the court, not the party, is to judge.

The affidavit should specify, with reasonable certainty, the subject upon which the witness was requested to depose, and the facts claimed by the party to be within the knowledge of such witness, and bearing upon the merits of the motion desired to be made. This requisite would not only enable the court to determine the propriety of granting such order, but would furnish some guide to the examination. It is apparent that it was not intended to authorize an examination of a witness, by way of experiment, to ascertain what he might state in regard to the controversy, leaving the party to

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his election whether or not to use the examination upon a motion, or in some manner and for some purpose upon the trial of the action. The courts should see that the provision in question, which is valuable for the purpose intended, be not perverted so as to become an instrument of injustice and oppression to parties or witnesses. The affidavit in question merely states, upon this subject, that it will be necessary to have the affidavit of Nathan Dauchy for the purpose of the motion,—not a fact is stated which the defendant supposed to be within the knowledge of said Dauchy,—and it will be observed that the opinion of the defendant, in regard to the necessity of Dauchy's affidavit to be used upon the motion, does not purport to be based even upon the advice of counsel.

It would be a safe and convenient practice for a party to prepare the required affidavit and submit it to the witness, and request him to verify the same; and in case of refusal, to make the proposed affidavit a part of the papers upon which the order is applied for. Of course such practice is not indispensable; but in this, or some other form, the court should be informed wherein the examination of the witness is material and necessary to the motion intended to be made.

The view, thus taken, I deem in harmony with the adjudications upon this subject (*Erie R. R. v. Gould*, 14 *Abb. Pr. N. S.*, 279; *H. R. R. Co. v. Hay*, *Id.*, 183; 4 *Wait Pr.*, 588).

The objection to this motion, that the moving papers do not point out particularly the irregularity complained of, can not prevail, for the reason that the order is assailed upon the ground that the affidavit was insufficient to justify the granting of said order, which is matter of substance, and aimed at the sufficiency of the entire proceeding, and not a technical irregularity. The order must be vacated; but as

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the practice in regard to such orders has not been uniform, no costs are allowed, but the defendant is at liberty to renew the application.

WADE *against* KALBFLEISCH.

Court of Appeals, 1874.

ABATEMENT AND REVIVAL.—BREACH OF PROMISE OF MARRIAGE.—MARRIAGE.

An action for breach of promise of marriage can not be revived, on the death of a party thereto.

Such action is not an action "upon contract" within 2 *Rev. Stat.*, 113, § 2, which provides that "actions of account, and all other actions upon contract may be maintained by or against executors," &c.

It is not founded on the pecuniary loss of support, dower, &c. ; nor is it an action "for wrongs done to the property, rights or interests" within 2 *Rev. Stat.*, 447, § 1 ; which provides that for such wrongs, if an action might be maintained against the wrongdoer, it may be brought by the person injured, or, after his death, by his representatives, against the wrongdoer, or, after his death, against his representatives.

Marriage, while partaking of some of the requirements of a contract, as declared in 2 *Rev. Stat.*, 138, § 1 ; which declares that "marriage, so far as its validity in law is concerned, shall continue in this State, a civil contract," &c., is not a contract in the usual meaning of that term, as employed at common law or by statute.*

* The legal principle on which this decision rests, might be stated in another form, as follows : The gist of the action for breach of promise of marriage, is not the engagement of marriage, but the wrong done to the affections, reputation and prospects of the defendant, by repudiating her, and casting her off, after having engaged her affections, and given her, upon the faith thereof, a legal right to expect marriage, and a settlement in life. The contract or engagement to marry is essen-

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Mary F. Wade brought an action in the city court of Brooklyn, against Martin Kalbfleisch, for breach of promise of marriage. Pending suit, the defendant died. A motion on behalf of the plaintiff to revive the action against his executors, was denied at special term, the opinion of NEILSON, Ch. J. thereat, being reported in 15 *Abb. Pr.*, 16.

The general term, on an appeal from the order denying the motion, affirmed the same, with costs, February 10, 1874.

From the order of affirmance, the plaintiff now appeals to the court of appeals.

Erastus New, attorney for the plaintiff, appellant.

N. C. Moak, of counsel.—I. The cause of action arose and was founded upon contract (*McDonald v. Walsh*, 5 *Abb. Pr.*, 68; *McNeff v. Short*, 14 *How. Pr.*, 463; 2 *Rev. Stat.*, 138, ch. 8, tit. 1, art. 1, § 1; 2 *Edm.*, 144; *Clayton v. Wardell*, 4 *N. Y.*, 230; *Siefke v. Tappay*, 3 *Code R.*, 23; *Mayne on Damages*, 2 ed., 375-377; *James v. Biddington*, 6 *Car. & P.*, 590; *Wood*

tial to the cause of action, but it is matter of inducement, rather than the foundation of the action. In *Homan v. Earle* (13 *Abb. Pr. N. S.*, 402; affirmed in 53 *N. Y.*, 267), the great question was, whether, since parties have been made competent as witnesses, an engagement to marry could be proved by the testimony of the defendant to such an intimacy and such acts and language as indicate that they both intended a mutual engagement and understood that it existed. And the court held that such evidence was sufficient, although there were no express verbal promise to marry. Viewed thus, the case in the text is not inconsistent with other cases which hold that a valid contract of engagement must exist, *e. g.*, *Feibel v. Obersky*, 13 *Abb. Pr. N. S.*, 402, *note*, where it was held that an infant is not liable to this action because he is not competent to contract; and *Haviland v. Halstead*, 34 *N. Y.*, 643, where it was held that the action would not lie, because the contract of engagement was void for incapacity of one of the parties (who had been divorced) to marry again. See also *Steinfeld v. Levy*, p. 26 of this vol.; and *Boyce v. People*, 55 *N. Y.*, 644.

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v. Hurd, 2 *Bing. N. C.*, 166; Kniffen v. McConnell, 30 *N. Y.*, 292; Southard v. Rexford, 6 *Cow.*, 254; Giles v. O'Toole, 4 *Barb.*, 261).

II. The action survives (*Mellen v. Baldwin*, 4 *Mass.*, 481; *Green v. Watkins*, 6 *Wheat.*, 260; *Macker v. Thomas*, 7 *Id.*, 530; *Hatch v. Eustis*, 1 *Gall.*, 162, 163; *Jacob Law Dict.*, tit. *Scire Facias*; *Potter v. Van Vranken*, 36 *N. Y.*, 619; *Frost v. Knight*, 1 *Eng. R.*, 218; *L. R.* 7 *Exch.*, 111; *Burtis v. Thompson*, 42 *N. Y.*, 246; *Haines v. Tucker*, 50 *N. H.*, 307; *Southard v. Rexford*, 6 *Cow.*, 254; *Stubbs v. Holywell R. Co.*, *L. R.* 2 *Exch.*, 311; *McKnight v. Dunlop*, 5 *N. Y.*, 537; *Clarke v. Meigs*, 10 *Bosw.*, 338; *Christianson v. Sinfard*, 19 *Abb. Pr.*, 224; *Cutler v. Smith*, 43 *Vt.*, 577); though founded on tort (2 *Rev. Stat.*, 447; 2 *Edm.*, 467; *Haight v. Hoyt*, 19 *N. Y.*, 467-8; *Freid v. N. Y. Central R. R. Co.*, 25 *How. Pr.*, 236-7; *Barnes v. Buck*, 1 *Lans.*, 269; *Waffle v. Dillenbeck*, 39 *Barb.*, 133).

III. Though a contract be not assignable, a cause of action for its breach may be (2 *E. D. Smith*, 393; *Peace v. Chamberlain*, 2 *Ves. Sr.*, 35; *Reeves Dom. Rel.* 345; *Simar v. Canaday*, 53 *N. Y.*, 298).

IV. The authorities cited by the respondent's counsel, and by the court below, do not show the plaintiff was not entitled to a revivor of the action (*Wheatley v. Lane*, 1 *Saund.*, 216, a, note 1; *Read v. Hatch*, 19 *Pick.*, 47; *Moore v. Jones*, 23 *Vt.*, 739). The counsel also referred to the cases considered in the opinion of CHURCH, Ch. J.

W. A. Beach, for the defendant respondent.

CHURCH, Ch. J.—The question involved in the order appealed from, is whether an action for a breach of promise of marriage can be revived against the executors or administrators of the promisor. Originally at

common law, all actions abated by the death of a sole plaintiff or defendant, and if the cause of action survived, a new writ was necessary.

This rule has been somewhat modified in England, by statute and judicial decisions (13 *N. Y.*, 333). In this State it is regulated by statute. The Code (§ 121), provides that no action shall abate by the death, marriage, or other disability of a party . . . if the cause of action survives, or continue. 2 *Rev. Stat.*, 113, provides that actions of account, and "*all other actions upon contract*, may be maintained by and against executors in all cases in which the same might have been maintained by or against their respective testators." A like provision extends to administrators. It is indispensable, therefore, to determine whether this is an action upon contract, within the meaning of this statute.

The general statute "that marriage, so far as its validity in law is concerned, shall continue in this state a civil contract, to which the consent of parties capable in law of contracting, shall be essential" (2 *Rev. Stat.*, 138), is not decisive of the question. This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes, and distinguishing features it does not interfere with nor attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word contract, employed in the common law or statutes. In this State, and at common law, it may be entered into by persons respectively, of fourteen and twelve. It can not be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority

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upon principles of public policy for the benefit of the community. KENT says: "It has its foundation in nature, and is the only lawful relation by which providence has permitted the continuance of the race" (2 *Kent Com.*, 75). Judge STORY says: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties" (*Story on Con. of Laws*, § 108). He quotes approvingly, a distinguished Scottish judge, to the effect that marriage is "*sui generis*, and differing in some respects from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts, may not apply to this" (§ 109). In *Ditson v. Ditson* (4 *R. I.*, 87, 101), the court say: "In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract which they can make." It has been held not to be a contract under the provision of the United States constitution prohibiting States from passing laws impairing the obligations of contracts (5 *Barb.*, 480-6; 8 *Conn.*, 540; 7 *Dana*, 181; 4 *R. I.*, 87). MASON, J., in 5 *Barb.*, 480, concludes his opinion by saying that "the marriage relation is not created by what we understand to be a contract in the strict common-law sense of that term." The marriage relation is essentially personal. Neither the rights, duties, or obligations created by or flowing from it can be transferred, and the action for breach of promise of marriage scarcely resembles in its main features, an action upon contract.

LAMONT, J., in 1 *Lans.* 268, held that a promise to marry is not a contract within the meaning of the attachment laws. In actions on contract, the damages are limited by a fixed rule, to the pecuniary loss sustained; while in this the damages are at the discretion of the jury, to the same extent as in strictly personal

actions, such as slander, malicious prosecution, assault and battery, and the like, and the recovery may be, and usually is, principally for injured feelings, anxiety of mind, wounded pride, and blighted affections (*L. R. 1 C. P.*, 331 ; 87 *E. C. L. R.*, 659 ; 42 *N. Y.*, 474 ; 45 *Maine*, 348 ; 8 *Barb.*, 326 ; 15 *N. Y.*, 353).

In actions on contract, the motives for violation are immaterial. In this action, the motives and conduct of the defendant, and other extrinsic circumstances, may be given in evidence, in mitigation or aggravation ; and punitive damages may be recovered (8 *Barb.*, 326), while in actions on contract, they are not allowed (*Sedg. on Dam.*, 226).

So the habits, character and conduct of the plaintiff may be shown in defense or mitigation of damages (5 *Abb. Pr. N. S.*, 29).

In short, looking at the substance of the action, no court would be justified in holding that it is an action upon contract, within the meaning of the statute referred to.

The learned counsel suggested that, upon a trial against executors or administrators, the personal elements of the action might be eliminated, and a recovery confined to the pecuniary loss, for a support, dower, &c. There is no precedent for such a proceeding, and no principle upon which it could be adopted. For some purposes, where the relation exists, the pecuniary rights of the wife are estimated and protected by the courts. But what would be the rule of pecuniary loss, hypothetically sustained, for support? Would it be competent to prove the value of the defendant's property? Such evidence is admitted, in this action, not to prove the pecuniary loss for support, but to show what the station of the plaintiff in society would have been, which is purely a personal grievance and injury (25 *E. C. L. R.*, 590). The counsel likened it to an employment, for a term of years, at a fixed salary, and con-

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tract broken by the employer without cause. If it could be thus transformed, it would be competent to show, in defense, that the plaintiff had an opportunity to contract an equally eligible marriage with another person, and the plea of the want of affinity or affection would not avail. As to dower, there could be no certainty to base a recovery upon. It would have been competent for the defendant to have disposed of all real estate before marriage, and all personal estate before death. Aside from these considerations, suggested to show the novelty, if not the absurdity of such a trial, the brief answer to this point is, that the action is, from its peculiar nature, indivisible. If revived at all, it must be revived as an entirety. If its personal features are abandoned, the incidents only remain. The circumstances relative to the property and standing of the defendant are admissible upon the question of damages, but they are incidental and subordinate, and so complicated with personal injuries as to render their separation impracticable.

It is also urged that, if this is not an action upon contract, it may be revived under the provision of 2 *Rev. Stat.*, 447, which provides that, "for wrongs done to property-rights or interests," an action may be maintained by or against executors, &c., except actions for slander, libel, assault and battery, false imprisonment, and actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate. The views before expressed dispose of this point. The wrongs for which this statute authorizes an action to be brought, by or against executors, are such as affect property, or property, rights and interests; or, in other words, such as affect the estate.

The statute is mutual, and actions may be brought not only against, but by executors, &c. Executors represent property only. They can take only such rights

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of action as affect property, and can not recover for injuries for personal wrongs. If the statute had intended to reach this class of wrongs, we must presume that it would have been so expressed. The general language does not embrace them. Although, in form, this action resembles an action on contract, in substance it falls within the definition of the exception, as an action on the case for personal injuries.

It is unnecessary to classify it. It is properly termed, *sui generis*. The form of the action is not material. The controlling consideration is, that it does not relate to property interests, but to personal injuries. In *Zabriskie v. Smith* (13 N. Y., 322), DENIO, J., in delivering the opinion of the court, specifies this as an action where the damage consists entirely of personal suffering, and can not, therefore, be revived. It is said in 25 *How. Pr.*, 286, that *Zabriskie v. Smith* was wrongly decided, in consequence of overlooking the statute last referred to. Whether this is so or not, as to the action then involved, the opinion respecting the nature of this action remains unimpaired. The precise point presented in this case has never been determined in this State, although the facts involved must have existed. This furnishes some evidence that the common-law maxim, *actio personalis moritur cum persona*, is regarded by the profession as applicable to this action, notwithstanding the statutes. No case has been cited, from any source, where any court has permitted a revivor of such an action. On the contrary, every court where the question has been presented, so far as I have examined, has decided adversely (2 *Maule & Sel.*, 408; 1 *Pick.* (18 *Mass.*), 71; 4 *Cush.* (58 *Mass.*), 408; 13 *Serg. & Rawle*, 183).

These decisions were based upon the nature of the action, and are legitimate authorities upon the question in this State. Our statutes do not weaken their

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force. Upon precedent, therefore, as well as principle, the order should be affirmed.

All concur, except RAPALLO, J., dissenting.

SPICER *against* SPICER.

City Court of Brooklyn, General Term; December, 1873.

MARRIAGE.—PRESUMPTION OF DEATH.—VOID AND VOIDABLE MARRIAGE.—TESTIMONY TO MARRIAGE.
—DOWER.—ESTOPPEL.—AGREEMENT, IN LIEU OF WILL.—EVIDENCE OF VALUE.

Under the provisions of 2 *Rev. Stat.*, 139, § 6,—making marriages contracted in good faith, &c., during absence of husband or wife, in certain cases, void only from the time that the nullity thereof shall be pronounced by a court of competent authority,—a marriage contracted, living the former husband or wife, is not to be regarded as valid for any other purpose concerning property, than that of preserving the inheritance of the offspring thereof, from the competent parent.*

A wife, whose husband absents himself, for the space of five successive years, without being known to her to be living during that time, is incapable of contracting marriage, notwithstanding the statute; and therefore is not entitled to dower in the property of her second husband.

The mere acceptance of a conveyance, in which a woman is described as the wife of a person named, does not estop the grantee from assailing the validity of the marriage.

A man living with a woman, under color of a void marriage, was about to devise his property to her, when his brother induced him to convey the property to him,—the brother,—upon the promise that he would pay the woman an amount equal to her dower, upon her husband's death. *Held*, that having thus diverted the property

* Compare Anonymous, 14 *Abb. Pr. N. S.*, 171; also, 9 *Abb. L. J.*, 5, 25.

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by the force of this promise, he was estopped from denying the validity of the marriage: and that, as against him, the widow could recover the value of her dower.

The consideration-money mentioned in the title-deeds,—*Held*, under the circumstances, not sufficient evidence of value to sustain a verdict. Whether a widow, suing her husband's grantee to recover dower, is not a competent witness to prove a marriage,*—*Query*.

Elizabeth H. Spicer sued George Spicer to recover the sum of forty-one thousand dollars, claimed to be due her as dower in the lands of her deceased husband.

It appeared that Elizabeth married one Miller, in 1839. He subsequently deserted her; and after more than five years' absence she, believing, as she testified, that he was dead, married John Spicer. An intermediate marriage it is not necessary to notice. John and Elizabeth lived together, as husband and wife, from June, 1852, to July, 1868, when John died, leaving a considerable estate in real property. It appeared, by the testimony, that when John was very ill, in 1863, he proposed to Elizabeth that he should make his will; whereupon George, the defendant, the brother of John, interposed, saying he could propose a better plan, namely, that John and his wife should convey the property held in John's name to him, George, as one-half of it already belonged to him, and that in case of John's death he would pay his wife her half, &c. John and Elizabeth accordingly executed deeds of the property to George, in which Elizabeth was described as the wife of John. These deeds were delivered to George Spicer, and, after the death of John, were recorded, and George Spicer took possession.

Plaintiff's complaint alleged her marriage with John, John's ownership of the real property in question, dur-

* Compare, beside cases cited by counsel, *Clarke v. Smith*, 46 *Barb.*, 30; *Dyer v. Dyer*, 48 *Id.*, 190; *Stanley v. Whitney*, 47 *Id.*, 586; *Keator v. Dimmick*, 46 *Id.*, 158; *Van Tuyl v. Van Tuyl*, 8 *Abb. Pr. N. S.*, 5; *Dietrich's Case*, 1 *Tuck.*, 129; *Matter of Paige*, 62 *Barb.*, 476; *Franklin v. Pinckney*, 18 *Abb. Pr.*, 186; *Timon v. Claffy*, 45 *Barb.*, 488.
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ing the marriage, and in his lifetime, and the circumstances of the conveyance to George on the faith of his promise to pay plaintiff dower, and that the sum claimed was due her from defendant, by reason of his agreement, and by reason of her right thereto also as dowress ; and further alleged promises to secure the sum due, and admitted small payments on account.

The defense was that the marriage of John was void, because Miller, the absent first husband, was still living ; and he was in fact produced as a witness upon the trial.

On the trial, plaintiff being examined as a witness, was asked among other things, " When did you marry John Spicer ? "

Defendant's counsel objected to any testimony by her as to any transaction or communication between her and John as inadmissible, under the Code, he being dead, and George, the defendant, being his grantee and assignee.

The court ruled that she was competent to show the fact of the marriage, and admitted testimony of the plaintiff to the effect that she married John, stating time, place, officiating clergyman, and where they went, and some of the circumstances of their journey together, after the marriage. The witness was also allowed to state what transpired in her presence, when her husband became ill, in relation to this property ; what was said between her and George, and her husband, with reference to the property. This, the court admitted only for the purpose of showing what the contract was between herself and George Spicer. The statements made by John in the presence of George, and within his hearing, were thus admitted.

The jury found a verdict for the plaintiff for five thousand seven hundred and seventy-two dollars and eighty-five cents.

On motion for a new trial made on the minutes, Mr. Justice McCUE disposed of the objection as to the ad-

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missibility of plaintiff as a witness to prove her marriage by the following remarks:

"I am still of opinion that the plaintiff was properly examined as a witness to prove her marriage with John Spicer, and that, on the question of her marriage with John Spicer, the finding of the jury is supported by abundant testimony.

"The object of the examination was not to affect, in any way, the rights of defendant as assignee or grantee of John Spicer (for the plaintiff expressly confirmed the conveyance made by John Spicer to the defendant), but to establish the plaintiff's right to recover the value of her interest in the land so conveyed, arising out of an independent agreement between plaintiff and defendant.

"The defendant accepted the conveyances of the land *cum onere*, burdened with the rights of plaintiff in said land, as the wife of John Spicer, under a special agreement to pay her the value of her interest therein, upon the happening of a certain contingency, to wit: the death of John Spicer.

"The acts of John Spicer alone,—in introducing the plaintiff to the world as his wife, permitting her to join in the execution of deeds as his wife,—was sufficient, without other proof, to establish plaintiff's position as wife and widow, and to furnish a sufficient consideration for defendant's promise. Her marriage with John, therefore, was abundantly established by John's own acts and declarations. Plaintiff's testimony went no further than to fix the time when, and the person by whom, the marriage ceremony was performed. Her testimony could not possibly affect the transaction between the husband and the defendant, and does not come within the rule which induced the enactment that one person should not be allowed to be a witness as to transactions occurring between that person and another person then deceased."

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The motion for a new trial having been denied, defendant appealed to the general term.

N. B. Hoxie, for defendant appellant.—I. The exception to plaintiff's testimony was well taken, for she was "a party to the action," was "examined as a witness in regard to a personal transaction or communication between herself and a person at the time of such examination deceased" (that is, John Spicer), "against the assignee of such deceased person" (that is, George Spicer). A grantee is an "assignee" within section 399 of the Code (*Mattoon v. Young*, 45 *N. Y.*, 696). He was also "heir at law, and next of kin." The test of the admissibility of such testimony is: "Does it tend to prove what the testimony was?" (*Stanley v. Whitney*, 47 *Barb.*, 586; *Strong v. Dean*, 55 *Id.*, 337; *Clark v. Smith*, 46 *Id.*, 30; *Barrett v. Carter*, 3 *Lans.*, 68). The successive amendments of this section have made it more and more exclusive (*Van Alstyne v. Van Alstyne*, 28 *N. Y.*, 375; *Kerr v. McGuire*, 28 *N. Y.*, 446; *S. C.*, 28 *How. Pr.*, 27; *Angevine v. Angevine*, 48 *Barb.*, 417, directly in point. See also, *Hatch v. Peugnet*, 64 *Barb.*, 189).

II. There was no other testimony, as to value, than that of a witness as to value in 1868,—the time of Spicer's death,—to which exception was taken, and the jury must have speculated as to the value in 1863; and it can not be certain that defendant was not prejudiced by this evidence (47 *N. Y.*, 186; 1 *Id.*, 519; 4 *Abb. Ct. App. Dec.*, 621).*

III. The exception to the denial of the defendant's motion for judgment was well taken. The claim that the plaintiff could be dowable of the land of *three* husbands, or of two, all living at the same time, from neither of whom had she been divorced, is at war with

* But compare *People v. Gonzalez*, 35 *N. Y.*, 49.

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the whole theory and body of the law of real estate, common and statute. The section of the statute (*Rev. Stat.*, part 2, ch. 8, title 1, art. 1, § 5), making subsequent marriage void only from the time of a decree, can not according to well settled rules of construction, be held to warrant such a deviation from and violation of settled principles of law as is claimed here. It was enacted for a special purpose, and can not be extended beyond such purpose. Unquestionably, plaintiff was, and is dowable of the lands of Miller. Her marriage with him is in full force, therefore, she could not be dowable of the land of John Spicer. The subsequent section of the statute (§ 23) shows that it was not contemplated by the legislature, that the party having such former husband or wife living, should acquire by such subsequent marriage the rights pertaining to one free from objection, because by such section (23), the children of such subsequent voidable marriage are permitted to succeed *in the same manner as legitimate children*, to the real and personal property of the parent, *who at the time of the marriage, was competent to contract*. The effect of sustaining plaintiff's claim is, that while any children that might have been born of her marriage with John Spicer, could not succeed to any real or personal property she might own, because of her incompetency to contract; yet, she herself, through whose misconduct or fault in contracting the marriage, such innocent children would so suffer, can have all the rights of property pertaining to a marriage free from obstacle, objection, or doubt. Such a result shocks the moral sense, and shows conclusively that it could not have been intended. Chancellor KENT says (vol. 4 *Com.*, p. 35): "This humane provision of the common law (dower) was intended for the sure and competent sustenance of the widow, *and the better nurture and education of her children*. A woman can not be endowed unless her marriage was a *valid and unimpeachable*

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one. She can not acquire a dower-right from a voidable marriage. No case can be found where dower was allowed upon such marriage. In *White v. Lowe* (1 *Redfield*, 377), letters of administration only were granted. In *Cropsey v. McKinney* (30 *Barb.*, 47), the controversy was between assignees of the wife, and assignees of the husband under a voidable marriage. The latter were successful. Such husband was the party competent to contract the marriage. At the close of the opinion in this case, when speaking of the children of the marriage, there is a significant hesitation and an express refusal to determine *as to the rights of such children*. These cases are of a surrogate and of a single judge, and not authoritative. *Valleau v. Valleau* (6 *Paige*, 207), simply decides that in case of such subsequent marriage, the first husband can not procure a divorce on the ground of adultery, and in no wise touches the question under examination. Wherever any suggestion can be found as to dower attaching upon voidable marriages, *i. e.*, to a wife *de facto*,—dissoluble marriages are meant, *i. e.*, where divorces may be obtained upon some ground not affecting the original validity of the marriage. This court was a competent court, and this case the proper case in which to adjudge the alleged marriage with John Spicer, void. The action is by one of the parties to such marriage, and against the immediate successor and representative of the other party to such marriage, *i. e.*, John Spicer. Such marriage is the foundation of this action. It is directly averred, and put in issue, and if not properly adjudicable here, it is difficult to imagine in what action, and between what parties it could be. John Spicer is dead, and Miller is in no wise connected with the defendant, or the property or claim in question. *Kerr v. Kerr* (41 *N. Y.*, 272), was a proceeding before the surrogate. The parties were two women, each claiming to be the widow of the intestate, and in that

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case a marriage was adjudged null and void, *because, at the time of its occurrence, the intestate had a wife living*. If, in this case a specific adjudication of the nullity of the marriage was not proper, the facts establishing such nullity all appeared unquestioned, and being destructive of the foundation of plaintiff's claim, it was competent and proper for the court to reject such claim. In this action the court did in effect adjudicate upon *and nullify* the marriage of the plaintiff with *Jared W. Bell*, because of, and upon evidence that, *he* had a former wife living when he married plaintiff. If this court was competent in this action, to thus overcome and destroy the defense, *based upon the marriage with Bell*, surely it is equally competent to destroy the claim of the plaintiff, *based upon her alleged marriage with John Spicer*, at a time when, as conclusively shown, she had a former husband (Miller) living, and therefore, open to the same objection as she availed herself of to get rid of her marriage with Bell. There can be no distinction. In *Appleton v. Warner* (51 *Barb.*, 272), the N. Y. general term held that when it was shown that a party had a husband or wife living at the time of contracting a subsequent marriage, the court must adjudge such subsequent marriage void.

Dailey & Perry, for plaintiff respondent. I. The question asked the plaintiff, "Now, when did you marry John Spicer?" was competent, for the plaintiff could testify as to her marriage, the proof of marriage in this State being made by the admissions or declarations of the parties themselves, by their reception as man and wife, or by common reputation, and the wife is competent to testify as to a private marriage if denied by the defendant (2 *Greenl. Ev.*, § 461; *Fenton v. Reed*, 4 *Johns.*, 52; *Jackson v. Claw*, 18 *Id.*, 346; *O'Gara v. Eisenlohr*, 38 *N. Y.*, 296; *Bissell v. Bissell*, 7 *Abb.*

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Pr. N. S., 16; *S. C.*, 55 *Barb.*, 325; *Matthews' Pres. Ev.*, 283).

II. The objection is not sustained by section 399 of the Code, as the subject-matter of the question does not bring it within it, neither is this plaintiff, or this action affected by its provisions. (*a.*) The action is not against any executor, administrator, &c., or any representative, as such, of the estate of John Spicer, deceased. (*b.*) The defendant in this action is not an assignee, or in any way the legal representative of the deceased, as within the provisions of the Code, section 399, but is solely the grantee of the plaintiff and the deceased for a consideration agreed upon at the execution of the deeds, and for which consideration this action is brought. (*c.*) The defendant is not within the provision of the Code, so as to exclude the question, neither can it be claimed that the plaintiff is, although her right of action accrued by her relations with the deceased. She, as dowress, is not a representative of the deceased, through whom she claims, within the meaning of section 399 (*McCrary v. McCrary*, 12 *Abb. Pr.*, 1).

III. The question as to the contract made between the plaintiff and defendant, in presence of and by consent of John Spicer, deceased, was properly admitted. 1. On the ground, as stated by the court, to show the contract between the plaintiff and the defendant. 2. The question was admissible, even to show the conversation had by defendant with the deceased, although the defendant might have been a representative of the deceased, within the meaning of the Code, as it was held in a case commenced by an administrator, that the party to an action was not debarred from testifying with regard to a conversation heard by him, between the deceased and a third person (*Simmons v. Sisson*, 26 *N. Y.*, 264; *Lobdell v. Lobdell*, 36 *Id.* 334).

IV. The marriage to John Spicer was valid, under

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the revised statutes (Valleau v Valleau, 6 *Paige*, 207; Griffin v. Banks, 24 *How. Pr.*, 216; Cropsey v. McKinney, 30 *Barb.*, 47).

BY THE COURT.—REYNOLDS, J.—The plaintiff in this action was married to Hugh Miller, about the year 1839. As she claims, he, shortly after that, deserted her, and since about a year subsequent to the marriage, she had neither seen him, nor heard of his being alive up to the time of the trial of this action, which occurred in January, 1873.

Upon the trial, however, Miller appeared, and was sworn as a witness for the defendant. Leaving out of view the plaintiff's marriage with Bell, in 1850, it appears from her testimony that she was married to John Spicer, in June, 1852. He died in 1868.

In 1863, John Spicer, by deeds, in which the plaintiff as his wife joined, conveyed to the defendant certain real estate in the city of New York, and the plaintiff alleges that in consideration of such transfer, the defendant promised to pay to her in the event of the death of said John Spicer, "an amount equal to her dower, interest, and right of dower," in the property.

Upon this alleged promise the action was brought, and for the value of such dower-right, as estimated by the jury, the verdict in favor of the plaintiff, was rendered.

The first question which arises, is whether the plaintiff would have been entitled to dower, in lands of which John Spicer might have died seized.

Upon a careful examination of the statute, I have come to a conclusion, adverse to the plaintiff, upon this point. By section 5, of article 1, title 1, ch. 8, part 2 of the revised statutes (2 *Rev. Stat.*, 139), it is enacted that no second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, unless the former mar-

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riage shall have been annulled or dissolved from some cause other than the adultery of such person, or unless such former husband or wife shall have been finally sentenced to imprisonment for life ; and that every marriage contracted in violation of such provisions, shall be absolutely void, except in the case provided for in the next section.

That section is as follows : "SEC. 6. If any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living, during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority."

Article 2, of the same title, section 20, provides that the court "may by a sentence of nullity, declare void the marriage contract," for the reason "that the former husband or wife of one of the parties was living, and that the marriage with such former husband or wife was then in force." A subsequent section (22) of the same article declares that "when a marriage is sought to be annulled on the ground that the former husband or wife of one of the parties was living, it may be declared void on the application of either of the parties during the lifetime of the other, or upon the application of such former husband or wife."

The court, in pursuance of the provisions above recited, is not authorized to *dissolve* the last marriage, and does not undertake to do so, but simply to declare it to be illegal and void ; it pronounces it *null*, for the law does not contemplate the possibility of one being the lawful husband or wife of two persons at the same time.

In this case, the marriage between Hugh Miller and the plaintiff has never been dissolved, and she, being

his wife, was incapable of contracting a valid marriage with John Spicer.

Such a marriage being invalid, it can have no legal effect beyond what the statute gives it. What, then is meant by the provision that it shall not be void, or according to the section first cited, "absolutely void," until a "sentence of nullity" is pronounced against it?

A further reference to the statute will show. The next section (§ 23, same article) provides that "when it shall appear and be so declared that such subsequent marriage was contracted in good faith and with full belief of the parties that the former husband or wife was dead, the issue of such marriage born or begotten before its nullity shall be declared, shall be entitled to succeed in the same manner as legitimate children, to the real and personal estate of the parent, who, at the time of the marriage was competent to contract, and the issue so entitled shall be specified in the sentence of nullity.

A very high authority has spoken of this as legitimatizing the children. That is not quite accurate. If they were rendered legitimate, they could inherit from both parents, but they are only permitted to take *in the same manner* as legitimate children, from the parent only who was competent to contract, be it father or mother. Here is a special provision in favor of the children, and that a limited one. The care manifested in making the provision, the nature of the limitation, and the absence of any other provision as to property, shows almost conclusively to my mind that the legislature did not intend to confer any rights of property as arising from the marriage, upon the party who was not "competent to contract" it.

The legislature, by a farther enactment shows what effect it meant to give to such marriage, in favor of the party who, although incapable of contracting a valid marriage, might in good faith undertake to do so.

By section 9, article 2, title 5, ch. 1, of part 4, *Rev.*

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Stat., persons contracting a subsequent marriage, under the circumstances claimed in favor of the plaintiff, are exempted from the penal consequences of bigamy. The marriage is none the less illegal.

The law confers upon the issue a certain limited capacity to succeed to property; and to the party who would otherwise be liable, it extends immunity from punishment. It affords to such party a shield but not a sword. It follows, I think, that as the plaintiff was never the lawful wife of John Spicer, she was never dowerable of his lands. The text books say, in regard to the requisites of dower, "the marriage must be a legal one, though, if voidable only and not void, the wife will be entitled to dower, if it be not dissolved during the lifetime of the husband" (See 1 *Washburn on Real Property*, 108, 3 ed). As instances of marriages voidable only, they give the case of parties contracting marriage at an earlier age than that justified by the law of the country or state, and of the intermarriage of an aunt and nephew in England, where such a marriage was voidable, but not void. I apprehend the marriage under consideration was not "voidable only" in any such sense. Such a marriage is absolutely void *ab initio* at common law. 1 *Scribner on Dower*, 100, says, "a second marriage, while a former husband or wife is living, is *ipso facto* void without any divorce, as well by the spiritual as the common law. In the United States, this rule has been applied in several cases, involving the right of dower." In whatever respects our statutes may have changed this rule, I have endeavored to show that it confers no right of property through a marriage, one of the parties to which is under the disability of a prior marriage undetermined, except such as have been specified. Even if no sentence of nullity ever be pronounced, yet the issue of such a marriage can not inherit from the father, for it is only "when it shall appear, and be so decreed, that such

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subsequent marriage was contracted in good faith," &c., that the statute gives the right to succeed to the property of the parent who was "competent to contract."

When the court declares the marriage void the children are provided for by *decree*, and "the issue so entitled shall be specified in the sentence of nullity."

If the plaintiff's claim is valid, we should be led to the conclusion that in case of a marriage, which is liable to be declared void, because the woman was already the wife of another man, if no one invokes the judgment of the court before the man dies, the widow (so called), may claim her dower on the ground that she was legally his wife, while her own children by him, would be excluded on the ground of illegitimacy, from any inheritance in the very same property out of which she is thus endowed. It seems to me, the statute has not provided for such an astonishing result.

This is to me a new question. I find no case in which it has arisen, at least directly, nor do the researches of the counsel seem to have been more successful.

The author of the work on dower, above cited, seems to think that under our statute, such a marriage as we have been considering, is valid, as a prerequisite of dower, until annulled (vol. 1, pp. 111, 112, 124).

With great respect, I find myself unable to come to the same conclusion.

I am inclined to think, however, that upon the plaintiff's version of the transaction, which must be taken to have been sustained by the jury, the defendant, is estopped from denying the plaintiff's right to recover what would have been the amount of her dower in the premises in question, if John Spicer had died seized of such premises, leaving her his lawful widow. Not, as claimed by plaintiff's counsel, because he accepted a deed in which she was described as the wife of John Spicer, for "there is no general or inflexible principle which estops the grantee from showing that the gran-

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tor has no title, or none which is capable of being passed by the grant. The mere acceptance of a conveyance does not prevent him from showing want of estate in the grantor of the land conveyed" (*Herman on Estoppel*, 301). This position seems to be maintained by the authorities in this State.

But according to the plaintiff's statement, John Spicer was about to make a testamentary disposition of this very property in her favor. She was capable of taking it as his devisee. At this time the defendant interfered and procured the conveyance of the premises to himself upon the promise that he would pay her *an amount equal to her dower upon the death of John*. This, perhaps, *might fairly be said to mean* that he would pay her such an amount as she, if entitled to dower in the lands might claim, but I prefer to rest my conclusions on the ground, that having diverted the property from its course to her by will, by force of his promise, he is estopped from denying the validity of that promise while continuing to hold and enjoy its fruits.

I think, therefore, she may maintain this action upon a promise given, and accepted, and acted upon, as she swears this was, though she would not, as the widow of John Spicer, have been entitled to admeasurement of dower.

We come then to inquire whether there is sufficient evidence to sustain the finding of the jury as to the amount of the plaintiff's recovery. The court directed the jury to proceed on the basis of the value of the property at the time of the alienation, namely, 1863. It was conceded by the plaintiff that John Spicer owned in his own right only one undivided half of the premises, holding the other half in trust for George. What was the value of the half belonging to John?

The jury evidently assumed it to be twenty-nine thousand dollars, as upon that basis the precise result shown by the verdict, is attained.

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But so far as I can see, there is not sufficient evidence to support such assumption. It is true, the aggregate amount of the consideration named in the three deeds is twenty-nine thousand dollars, but I find nothing in the case to show that that sum was in fact the value, or was agreed upon or regarded by the parties as the value of the property, above the incumbrances ; certainly not as the value of one-half.

The consideration clauses in the deeds to defendant seem to have been taken from the corresponding deeds to John ; for instance, we find that the premises on the north side of Fifty-second-street were conveyed by John M. Bruce and wife to John Spicer, for an expressed consideration of nine thousand dollars, only a year before the conveyance to defendant, and the consideration named in the deed of the same premises to defendant, is also nine thousand dollars, although John Spicer, and plaintiff, as his wife, gave back mortgages on the same premises to Bruce, for nine thousand dollars in the aggregate, which mortgages were afterwards (in 1864) assigned to defendant. Surely, in the absence of any testimony as to value in 1863, or of any agreement of parties, the copying the consideration from one deed into another, without regard to intermediate incumbrances, or the distinction between a half and a whole interest, can afford no solid ground on which to base a verdict.

Since the argument, plaintiff's counsel has submitted an additional point on this subject, claiming aid from certain admissions in the answer.

But I see nothing there to help us out of this difficulty. The answer, as I construe it, merely admits that the complaint correctly set out the contents of the deeds in certain respects, not that the consideration expressed in the deeds was the actual consideration of the conveyance ; and there is no admission of any specific advance in value so as to dispense with proof on that point.

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If I am correct in the conclusion at which I have arrived, the judgment should be reversed, and a new trial granted. It is unnecessary to examine any of the other questions presented on the argument, though several of them would otherwise deserve a serious and careful consideration.

Judgment reversed, and a new trial granted. Costs to abide the event.

NEILSON, J., concurred.

*ingrained,
Nov 252.*

 BONARD'S WILL.

*Before Hon. Robert C. Hutchings, Surrogate of
the City and County of New York, 1872.*

TESTAMENTARY CAPACITY.—EVIDENCE ON PROBATE.

POWER OF CORPORATION TO TAKE BY WILL.—

EQUITABLE CONVERSION.—RULES OF
INTERPRETATION.

The testator, it was alleged, believed that the souls of men after death passed into animals; and, having no family nor known relations, devised and bequeathed his property to the Society for the Prevention of Cruelty to Animals. But it did not appear that he made any declaration of his peculiar opinions, in connection with his intended testamentary disposition. *Held*, that these opinions were not evidence of insanity or insane delusion, even though the testamentary intention might not, otherwise than for the alleged delusion, have been entertained.*

Belief on a question which is entirely within the domain of opinion or faith, and not of knowledge, such as the opinion as to a future state, can not, in any respect, be deemed evidence of insanity. On

* Compare *Austen v. Graham*, 1 *Spinks*, 357; and see *Medico Legal Papers*, 1st series, 114, 204, 467.

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such a question there is, in a logical sense, no major premise of knowledge.

An act, enabling a corporation to take by devise, can not have a retroactive effect, to make valid a devise by a testator who died before the act was in force.

A bequest of personal property to a corporation absolutely, with a subsequent clause in the will directing that the property should be invested in real estate by testator's executors, for the sole and perpetual use of the corporation,—*Held*, not to work an equitable conversion of the personalty into realty.

The court will not declare an equitable conversion to have taken place by implication, if the disposition of the fund, regarding it as realty, would render the provision of the will void.

A direction to invest personal property in land, given in separate clauses from the bequest of the personal property, may, if the beneficiary could not take real property, be rejected as a naked direction, and the bequest of the personalty may be sustained.

The rules applicable to clauses of revocation, and the general principles of interpretation of wills,—stated.

Method of examination and cross-examination of medical experts,—illustrated; with hypothetical questions on the facts claimed to have been proven

Contested probate of a last will.

The testator, Louis Bonard, devised and bequeathed

* There are three methods of presenting the testimony of a medical expert in such a case. 1. If the witness was the medical attendant of the person whose capacity is in question, or has adequately examined him, he may testify to his opinion as to such person's capacity, especially if his opinion is given in connection with his statement of the facts of the person's condition. For recent illustrations of this method, see *People v. Montgomery*, (13 *Abb. Pr. N. S.*, 207); *Macfarland's Trial*, (8 *Id.*, 57). 2. A medical expert who has heard all the testimony adduced upon the trial bearing upon the mental condition, may give his opinion on the question of what the facts proved or claimed to be proved, indicate as to the mental condition (see *People v. Lake*, 12 *N. Y.* (2 *Kern.*) 358; affirming 1 *Park. Cr.*, 495). 3. A medical expert may be asked what a supposed state of facts put to him hypothetically, but corresponding in details to the facts already in evidence on the trial, would indicate as to the mental condition. *Id.* The case in the text is an instance of the latter method.

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his entire estate, amounting to about one hundred and fifty thousand dollars to The American Society for the Prevention of Cruelty to Animals, a corporation of this State (created by 1 *Laws of* 1866, ch. 469). The text of the will is stated at length in the opinion of the Surrogate. Its probate was contested upon the ground that at the time of its execution, the testator entertained an insane delusion that upon his decease, his soul would enter into the body of some animal, and that, influenced by that decision, he executed the will propounded, with a view to the better security of his future existence. It was further objected that the will violated the statute against perpetuities; that the devise of the real estate was to a corporation not competent, at the time of the decease of the testator, to take by devise; and that an equitable conversion of the personalty into realty took place at that time also, and vitiated the bequest.

The parties contesting the probate, were certain alleged heirs of the testator, natives of France, and intervening through the French consul; and two persons claiming as legatees under a previous will. Evidence was given on the probate, bearing upon the life and habits of the testator, from which it appeared that he was a man of considerable education and shrewdness, simple and economical in his habits, and reticent on the subject of his family affairs, very fond of animals, often remarking that "they were better than men;" that he left France about 1849, went trading in South America and California, then came to New York, and completed his fortune by speculating in real estate, with great success. In February, 1871, he was seized with pneumonia, and taken, at his own request, to St. Vincent's Hospital, in New York city. While there he executed the will propounded; and soon after, having received the last sacraments of the Roman Catholic Church, breathed his last.

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Other facts appearing on the probate are mentioned by the Surrogate in his opinion, and are contained in the hypothetical questions propounded to Doctors Clymer and Hammond, the medical experts called in behalf of the proponents.

A part of the testimony of these two medical gentlemen upon the probate, is here inserted both as bearing upon the questions in the case, and as a valuable illustration of the methods of examination of scientific witnesses.

MEREDITH CLYMER, M. D., called for proponents, sworn.

Mr. Gerry, after asking witness to state his profession, the length of time he had been in it, what positions he had occupied, what specialties he had pursued, whether his attention had been especially called to insanity, and his familiarity with the subject historically, and with cases practically, and whether he had been called as a medical expert in such cases, &c., asked :

Q. What do you understand by an *insane delusion* ? give a brief definition.

A. Well, sir ; it is almost impossible to define it accurately. I can give a general idea by saying that it is a false notion, impossible in the nature of things, or the nature of the case—often personal to the individual who is suffering from it ; of the falsity of which he can not be persuaded by others, or persuade himself ; and in which the faculty or power of comparison is lessened or abolished.

Q. How does such a delusion differ from an illusion ?

A. An illusion is a false appreciation of a perception, or of a real sensation ; it is a mistaken perception ; it is a false perception of a sensation. A man, for example, looking into a cloud, describes it as a

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camel, or a horse, or some fantastic creature—that would be an illusion—seeing the transformation of what actually exists in some other form.

Q. Can you give an illustration of a delusion ?

A. An ordinary illustration is that of a person who thinks that he has a glass leg. I can also give a case, which happened quite recently in my experience, of a lady with unsoundness of mind. After several examinations, and very careful ones, I was unable to detect any delusion, until she suddenly ordered her children from the room, and then communicated to me the fact that all her troubles came from her daughter being *enceinte* by the Devil, and that the Devil took the form of various young men, and so on. That was evidently a delusion, and from that arose her peculiar treatment of her family—her dislike of one and special guarding of the others ; from that delusion arose the general symptoms of unsoundness of mind.

Q. How does an illusion differ from an hallucination ? Give an illustration.

A. An hallucination may be called a projection externally of an inward conception ; that is to say, it is a subjective sensation. The difference between an illusion and hallucination is that the object does not exist except in the idea or fancy of the person in a hallucination. If I were to call that chandelier a horse, or to say that I saw a horse suspended there, it would be an illusion. But an hallucination is not referred to any external object ; it is simply a subjective sensation ; it is a false perception of the various senses, as of the sense of hearing ; hearing sounds when no sounds exist, as Luther heard the voice of the Devil, and so on ; of the sense of touch, an ordinary illustration of which is when you take a simple round body and roll it between your two fingers crossed, there appears to be two, when it can be demonstrated that there is only one body. That is an hallucination of the sense of touch.

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Q. How does a delusion differ from a belief—what do you understand a belief to be?

A. A belief may be described as the assent to a proposition admitting of any degree of strength, from the slightest probability to the fullest certainty. There are various forms and gradations or degrees of belief. There is a mere notional belief, and there is a religious belief or conviction, which admits of no doubt or discussion, and which is fixed.

Q. How does a belief differ from a delusion?

A. That is a question which can not be answered by a single illustration; it will admit of a wide range.

Q. I will put it in this form: In your judgment, as a medical man, would the expression of a belief by any adult of the human species, at variance with that generally entertained by those of his fellow-beings with whom he more immediately lived, and among whom he moved, indicate the existence of any mental disease?

A. No, sir; in my opinion, no.

Q. Would it indicate any irrationality, any defect of the power of reasoning, on the part of such adult?

A. No, not necessarily.

Q. [1] Suppose any one of the human species, an adult, were to express a belief in regard to the future existence of the soul, which belief, although formerly entertained centuries ago by the then civilized world, and now maintained by over four hundred millions of people as a distinct religious creed, is, nevertheless, at the present day, regarded as purely heretical and absurd by the more civilized portion of mankind—would, I ask, the expression of such an opinion, repeatedly asserted, and maintained at times with considerable warmth of expression by that adult, indicate to you, as a medical man, the existence in him of any insane delusion, mental derangement, irrationality, or unsoundness of mind?

A. No; not by itself alone.

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Q. [2] Suppose a man sixty years of age and upwards, should, ten years prior to his death, entertain, and repeatedly express it to be his firm belief that upon the death of man the soul passes into the body of some animal, without, however, asserting it as his belief as to his own soul; and then for the ten years immediately preceding his death should not be known or heard to assert such belief, and finally should die professing the faith of a church which taught that the expression of any such belief, and that such belief itself, was a heresy, —would you consider that this belief, assuming it to be a delusion, continued to the time of his death?

A. I understand that it is assumed in your question that a period of ten years elapsed between the expression of this belief, which is again assumed as a possible delusion, and the death of this individual—am I correct?

Q. Entirely so.

A. Assuming it to be a delusion, the strong probability in such a case, amounting almost to a certainty, would be that it had not continued during those ten years; because delusions take possession of a man; are his main subject of conversation, are constantly being recurred to and referred to. A delusion is a man's main thought, intruding itself upon nearly all occasions, as a general rule. For that reason, I should say that the strong probability, almost certainty, was that during that time no such delusion was entertained.

Q. [3] Suppose such a man, under the circumstances mentioned in my last question, should, shortly before his death, sign a paper purporting to be a will, in favor of a society or corporation, created by law for the express purpose of enforcing all laws passed or to be passed for the prevention of cruelty to animals, and for their protection, and should state in such will which he so signs, that he entertained for the president of this society, and at the time of making the will entertained, the highest respect and admiration, "he being a gen-

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tleman whose laudable, untiring, and humane exertions on behalf of the dumb portions of God's creatures, has elevated him, in my estimation, far above any other man I know, or ever heard of," and should not assign or state in the will which he so signed any other reasons for making the disposition of his property by it in favor of this society, in the way in which he did—would you from this circumstance and act on his part, believe, as a medical man, that such will or paper was so signed and executed by him in furtherance of, or as in any way connected with, any insane delusion, irrationality, mental derangement, or unsoundness of mind.

A. As the question is stated, I can not see the act, as described in the question, to be connected with any irrationality or delusion.

Q. [4] Would the fact, assuming it to be so, that by such will this man gave to this society, which I have mentioned in my last question, the whole of his property, both real and personal, amounting in value to over one hundred thousand dollars, affect or alter your answer to the last question?

A. No, sir.

Q. [5] Suppose a man had been entirely separated from his family and relations for over twenty-five years, having neither wife, child, nor parent—who appeared to be economical, and even parsimonious in his habits, and yet who professed a great affection for dumb animals, his age being sixty years or thereabouts, was, by last will, to leave his entire property to a society or corporation instituted for the prevention of cruelty to animals, the president of which society he had long had in his mind, and at the time of making the will expressed it as his conviction that such president possessed his highest respect and admiration—now, would you, as a medical man, regard the fact of his executing such will, under such circumstances, excluding all these relatives, if he had any, having been estranged

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from them for over twenty-five years, making his will in favor of this society in consequence of the opinion which he had entertained of its president, as indicating to you the presence of any irrationality, insane delusion, mental unsoundness, or mental derangement at the time of the execution of the will ?

A. No, sir.

Q. In the course of your professional study, in connection with the subject of insanity, have you had occasion to examine, and have you examined, the subject of metempsychosis, or the theory of the transmigration of souls, as bearing upon the question of alleged insane delusion connected therewith ?

A. I have.

Q. Will you state, as concisely as you can, the result of your examination upon the subject, more especially as bearing upon the question of the sanity or rationality of those who have entertained or professed to entertain any such belief or theory ?

A. The doctrine of the transmigration of souls appears to have been not only a very ancient but at one time a very common one. In modern times we know it more as the doctrine of Pythagoras; but when you come to study out the subject you will find that he got it from the Egyptians. Now, it is held that the Egyptians were the first to believe in the immortality of the soul, and that this doctrine of metempsychosis was the first expression of the belief in the immortality of the soul. I should have prefaced this with a definition of the term metempsychosis. The term implies the passage of the animating quality, or what is believed to be the animating quality, of the body of a man into animals successively; and, by some who have held that doctrine—some people or believers (and when I speak of *believers* I mean whole masses)—again returning after a certain purification by its progression through these animals to the human form again. That would

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seem unquestionably to have been the belief of the Egyptians; and it would appear that it was one of the reasons for which they preserved their mummies. The soul or animating principle went through a sort of expiation by the passage into the different animals, until finally, say after a period of three thousand years, it was re-born humanly into the body of a young infant, and then going on again, and on its death taking up an animal direction. It was also held by the believers of this doctrine that the kind of animal that the soul went into was according to the nature of the individual; a ferocious temperament going into a lion, a cunning person into a fox, usurers into asses, and so on. The doctrine was held by the Celtic Druids, the Druids in France, the Druids in Britain; it came originally from Germany with the Druids. It was supposed by some of the biographers of Pythagoras that he got this idea from the Druids during his residence at Crotona; but the better historians on this subject seem to think that the Druids got many of their doctrines from him, and that Pythagoras got his doctrine of metempsychosis during his residence in Egypt. The doctrine undoubtedly prevailed in a modified form among the ancient Greeks before the Pythagorean time. It is also still held as a belief amongst the Brahmins.

Q. About how many in numbers are there of the Brahmins?

A. There are several millions; I can not tell the exact number; the followers of that religion are counted by several millions. The form of the doctrine that was taught by Pythagoras was adopted and taught by the Grecian philosophers and metaphysicians. It seems never to have been adopted by the Romans, but we find it amongst several of the early fathers of the Christian church. Origen was a holder of that belief. It has even been attempted to prove that the belief was

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countenanced in the New Testament by some verses, I think in the ninth chapter of John. That matter has been discussed by some of the theologians. Origen and his followers held this belief, and held it very strongly. And it is held by some—I am not committing myself, in relating the history, either for or against any of the statements—it is held by some that the doctrine of Purgatory originated in that way. Again, in modern times, it was held distinctly by Fourier, and is still by his disciples in France.

Q. Would you consider a man who entertained such a belief irrational?

A. Not necessarily, and for this reason; that it is a belief, in the first place, that has been held by many of the first minds in the world in former times, and even in modern times—Fourier himself being a good mind. Such beliefs are held sometimes as a mere metaphysical belief. There is a difference between a conviction and merely holding a general belief upon a subject; and for that reason I should not suppose that it necessarily involved any irrationality or mental unsoundness. Beliefs of that kind, and even beliefs which are more extravagant, do not necessarily involve unsoundness of mind, when looked at in an abstract way by a medical man.

The doctrines of the Christian church are held variously; what one sect believes another holds to be irrational, in the ordinary meaning of the term. But a medical man asked to investigate the mental condition of a person holding such a religious belief, and finding no other evidence of delusion or of mental unsoundness generally, certainly would not be warranted in saying that such a person was laboring under any degree of mental unsoundness.

That is my reason for answering categorically, shortly, no.

Q. Will you name some of those prominent men

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who entertained and openly professed to entertain this belief, and who were always regarded, for aught that appears to the contrary, as entirely sound in mind and perfectly rational?

A. I have mentioned already the name of Pythagoras, who was the founder of the school of Grecian philosophy, and there is no question as to his mental soundness, and thousands of his followers—I can not recall all the names at present. . . .

Plato held the doctrine and taught it, as you will see by his works.

Q. Is there anything about it in Ovid?

A. Ovid refers to it in several parts of the *Metamorphoses* as a doctrine held. Montaigne, in his *Essays*, refers to it without derision. He says it is a doctrine that has not only been held in the past but is held at the present day. I think it is in his *Essay on Cruelty to Animals*, if I am not mistaken. All who have held that doctrine were strict believers in the immortality of the soul. They base upon that, that the soul being eternal, never ceases to be removed and shifted in its place from one body to another.

Q. Do you know whether this doctrine or theory was regarded as a heresy by the Jews as well as the Christians?

A. No; it was held by the Jews very strongly, decidedly. That I omitted to state. The Pharisees believed in it as a part of their doctrine. The doctrine seems to have originated in the idea of the immortality of the soul. It was the first form in which that idea was presented to the human mind, and the doctrine was intended to reconcile the idea of the immortality of the soul, to make it understandable as against those who believed in total annihilation. It was for the purpose of presenting it in a tangible form. The soul passed into the body of one animal and then into another. And then there were modifications of it. The

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Egyptian form gave it a purgatorial nature, and when the soul was purified it returned and was re-born. In the Brahmin form the soul returned to God or Brahma.

Q. Do not persons laboring under insane delusions indicate in their writings some trace of their delusion?

A. Yes, sir.

Q. In the course of your examination of the subject, have you had occasion to read carefully the writings of any of the men that you have mentioned, such as Plato for instance, in which he has expressed this idea of metempsychosis?

A. I have read and examined the various passages of some of the prominent writers.

Q. As a medical man, did you discover anything in those passages indicating to you the existence in the mind of the person at the time he wrote them, of any mental unsoundness or delusion?

A. I did not; and their general reputation is for having been mentally very sound.

Cross-examined by Mr. COUDERT:

Q. You say you found no traces of unsoundness in any of those learned authors—you mean that you do not think Plato was insane because he wrote about metempsychosis—is that it?

A. Yes, sir.

Q. You have given us a very interesting and learned account of this belief—is that learning the result of your studies as a physician or merely as a preparation for this case?

A. Both.

Q. But as a physician you have had occasion to study this question?

A. As a physician, no; as a reader on metaphysical subjects in connection with the study of diseases of the mind, I have been in the habit of studying metaphys-

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ical questions and metaphysical works, &c. In other words, I was prepared to a certain degree with reference to this very subject, in a general way.

Q. In speaking, then, of metempsychosis as you have spoken to us, were you speaking merely as a man of learning on general subjects or as an expert?

A. I was speaking as a person of general information whose attention has been called to the subject.

Q. What is there in the subject of metempsychosis that would have induced or required you as a physician specially to examine it?

A. The subject has come up recently in an interesting case, and much conversation has been held generally upon it among persons interested in that subject, and my attention has been directed in that way towards it?

Q. What case is that?

A. The Bonard Will case.

Q. Then, until the Bonard Will case called your attention to it, you had not studied it as a physician?

A. No, sir; I had not.

Q. You made some preparation for this case—was it at the request of my learned adversary, Mr. Gerry?

A. Yes, sir.

Q. And you went over the case with him, and made notes to answer his questions, did you?

A. Yes, sir.

Q. And those notes you have referred to to-day, have you?

A. Those notes you saw me have in my hand—yes, sir.

Q. I saw you had your notes in your hand during the latter part of the examination, but not the first part?

A. No, sir; I have had no notes or answers prepared to any of the interrogatories, with the exception

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of the general definitions and this matter of metempsychosis:

Q. Those definitions you had written out in advance ?

A. To refresh my own memory.

Q. Now, those definitions are general ones ?

A. Yes, sir.

Q. Are there not cases that it is very difficult to class under these definitions—I mean, do not cases run into each other to such an extent that it is frequently difficult to give an absolute definition ? For instance, you have defined belief, delusion, illusion, and hallucination ; now, are there not some cases so peculiar that it is difficult to tell where to class them, or to class them under any particular head ?

A. Yes, sir.

Q. And, of course, in these answers that you give, you merely give general definitions applicable to general cases ?

A. Yes, sir ; all definitions are more or less defective. I do not pretend to put them out as perfect definitions by any means.

Q. Now, is it not at times difficult to draw the line between belief and delusion ? Are there not some forms of belief that so closely resemble delusions that it is difficult to draw the line between ?

A. Well, the question is somewhat general—it depends so much upon the habit of thought of an individual. A person may regard another as holding a delusion, which others again may regard as a proper belief. It is a relative matter—it is not a positive matter ; and therefore I can not answer the question distinctly, yes or no. Take, for example, the various forms of belief of Christianity, in which it is held that such and such a belief of such a sect is evidently a delusion, a heresy, &c., while that belief is held by a large number of persons. A delusion is peculiar, particular to the individual himself, as a rule. You won't

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find ten thousand men believing that they have glass legs, or believing in any delusion of that kind. But you will find ten thousand, and ten millions and hundreds of millions, believing in some extravagant or particular proposition. That is the difference I make. I can only answer your question by an explanation.

Q. Then it is the number of votaries of a particular belief that would influence you in determining whether that belief is a delusion or not?

A. Certainly not; not the mere number. But if it is what is commonly known as a general belief—you may take, for example, the Mormons or the Shakers, who hold beliefs at variance with those commonly held—and there are many hundreds and thousands of them—but they have inherited this belief; they have been taught it as children; I can not call them delusions, however fallacious I might think the beliefs to be.

Q. Is there any form of religious belief, or any opinion upon such matters, that you would ever call a delusion?

A. I should hardly feel myself competent to pronounce upon any theological or religious question.

Q. You consider them outside of your department?

A. I do, sir.

Q. And you will not undertake to say, then, what is a delusion or a belief when it comes to questions in that department—is that what I understand you to say?

A. By religious, I understand you to mean the general belief. I meant to say in my previous answer that I do not consider myself capable to decide upon any religious belief and condemn it as wrong or heretical.

Q. Do you believe in the transmigration of souls into animals?

A. I do not—it is no part of my belief.

Q. What is your belief?

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A. I believe in the Christian religion.

Q. Then, of course, you can not believe in this doctrine of metempsychosis, such as you have defined it?

A. No.

Q. I am asking now in reference to the country and age in which you live—do you consider the belief in metempsychosis a general belief?

A. It is not, to the best of my knowledge.

Q. In the course of your experience have you known any man or woman, or, as my friend calls it, “an adult of the human species” of full age, who believed that his soul was going into a horse, a donkey, a dog, or a cat?

A. Not to my recollection.

Q. You have then practiced thirty odd years and have never known of such a case?

A. Yes, sir.

Q. Now, when you spoke of metempsychosis you very aptly drew a distinction, if I understood you correctly, between the metaphysical belief and the actual belief?

A. Yes, sir; mere notional belief, and religious belief, if I may use those words.

Q. And there is a great difference, is there not?

A. Yes, sir; a man may hold a metaphysical belief, a notional belief, to a certain extent; he may be able to be convinced of its impropriety; he may be able to renounce it; he may be very violent in his disputations about it, but really have no certain conviction upon the subject. He may hold it as a probability or possibility, but have no ultimate perfect conviction on the subject; it forming no part of what is called his faith. There is a great difference between faith and a mere notional belief.

Q. Now take the case of a man who is actually piously convinced that his soul after death will go into the body of an animal, and will require protection in

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consequence of its being in the lower order of animals,—is that what you call metempsychosis?

A. I never have heard a part of that definition—requiring protection.

Q. Then we will exclude that. Is that one of the forms of metempsychosis?

A. That is one of the forms of metempsychosis—the belief that at death, the soul or animating principle will pass into the body of some given animal.

Q. In the answers that you have given I understood you to say that you did not hold that a man was necessarily insane because he entertained this belief in metempsychosis. Were you speaking of the metaphysical belief or the actual, real, firm belief?

A. I was speaking of both—I included both.

Q. But suppose there were other circumstances in the case that tended to delusion, would you or not consider this belief, this actual belief that the soul of the individual was going into a horse, or a cat, or a dog, one of the links which might form a chain tending to an opinion that the party was irrational?

A. Not unless I could connect it with another or other palpable delusions.

Q. But if you could connect it, you would consider it a link, would you?

A. Certainly, it would be a link.

Q. Now, suppose a man of a very large estate, living in a cheap boarding-house in the poorest quarters of the city, alone, a man keeping kegs of gold under his bed, starting up at night with exclamations which are unintelligible to those who hear them—suppose him to be taken sick, to be conveyed to an hospital, to make two wills within a few days of his death, to believe at the time that he was dying, that his soul was going into the body of an animal, and then leaving every dollar that he possessed to a society, the only object of

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which was to protect animals—would you consider that man rational or irrational?

A. I should see no positive evidence of irrationality in the act.

Q. What do you mean by positive evidence; would you see any evidence whatever?

A. No evidence unless there were other symptoms or evidences of irrationality. It might be a mere fancy, a mere whim; I do not call that irrationality. We see people affected with whims who have a fanciful imagination, who do acts under those whims, but that alone does not necessarily constitute mental unsoundness.

Q. Is there any other theory by which you could account for such an act?

A. Well, the mere fact of his admitting that he held that belief at that time, and acting under the belief, the belief not constituting a delusion, I should not call that an act of irrationality.

Q. Then you don't consider that belief an irrational one?

A. I don't consider it a delusion.

Q. Do you consider it a rational or irrational belief?

A. It would be considered by certain persons, certain sects, as irrational, and others, the followers of Brahma, a large portion of the East Indians, would consider it a rational belief. I might consider the belief of the Mormons or of the Shakers as irrational, but certainly I would not, from their belief alone, pronounce a Mormon or a Shaker as of unsound mind in making a will, even in connection with that peculiar belief.

Q. Then, you draw no distinction in your own mind between the belief of any of those sects you have mentioned and this belief which we are now speaking of; you think they stand on the same footing, and you would consider that the same degree of rationality attached to each?

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A. Well, you have put to me hypothetically the question as to its being a religious and not a metaphysical belief. Am I right?

Q. Yes, an actual belief I am speaking of; an article of faith, of which he is as well satisfied as you are of your own faith?

A. Then I should not consider that as an evidence of irrationality.

Q. That was not precisely the question. The question that I put to you was whether you placed this actual belief in metempsychosis upon the same footing as the other beliefs that you have mentioned; that is, the Shakers and others? Do you think they are all equally rational beliefs? Can you answer that question?

A. I can not answer that question without an explanation.

Q. Did you ever hear of Hadfield's case?

A. Yes, sir.

Q. Do you know the circumstances of it as they have been handed down to us in the books?

A. Yes, sir.

Q. Do you know that he believed that he had to murder somebody in order to save the world?

A. Yes, sir.

Q. And going upon that belief he tried to kill the King of England?

A. Yes, sir.

Q. Was that a delusion or a religious belief?

A. That was a delusion.

Q. Why was it a delusion?

A. Because it was personal to the man and held only by himself—not a form of belief of numbers of other persons held in common by a variable number of individuals.

Q. Then the reason that you draw this distinction and accord the other to be a rational form of belief is that a great many others believe in it?

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A. Yes, sir.

Q. Suppose a man, fully satisfied that after dissolution his soul was to go into the body of an animal, and laboring under that belief he so disposed of his property that the proceeds of that property could be applied to the protection of animals, of the class of animals in which he was to go, would you consider that a rational act under these circumstances?

A. In connection with his belief, as an article of faith, I should not see irrationality in it, or unsoundness of mind.

Q. I don't know exactly what you mean by an article of faith?

A. A religious belief.

Q. Leave out the words and simply answer my question, if you can. I am speaking of a man in a dying condition. Suppose it was a notional belief, and that acting upon that notional belief, he disposed of his enormous estate in the way I have stated, would you consider it a rational or irrational act?

A. I should want to know more of the history of the individual, his family connections, whether he had children, a wife, or dependents, before I could answer it.

Q. Then you could not answer it?

A. Not in the manner you have put it, without further inquiry; for that would decide very much whether he had dislikes to particular individuals of his family, his daughter or wife, and so on; and whether he was influenced by those dislikes in connection with his fanciful belief.

Q. Then it is impossible to give a general answer to that question without knowing the particular circumstances of the case, and you should want to inquire into those before answering?

A. I should want to have them stated to me more

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particularly than they are in the preceding general question.

[Then followed a series of questions intended to show that, witness had cited the opinions of Origen from other writers, and without consulting the original, and that Origen stated the doctrine only to condemn it; also, that witness, being an adherent of the faith of the Protestant Episcopal Church, regarded the doctrine in question as false.]

Q. I will come back to my question. I understood you to say—and I have your definition here in writing—that an insane delusion is a false notion impossible in the nature of things. I also understood you to say, in answer to my questions, that, in your judgment, a belief in metempsychosis was a false notion and impossible. Now I ask you why, then, metempsychosis is not, in your opinion, an insane delusion, according to your own theory and definition?

A. I answer that again as I have already attempted to, because I added that it was personal to the individual—the delusion—in a vast majority of, if not in all, cases. Metempsychosis is not personal to the individual. It is believed at the present time by several hundred millions of persons, and has been so believed for a long time. It is only within a few years that an elaborate book has been written on it in England, in which the author expressed his belief in it.

Q. The only test is, that in one case it is a personal belief, and in the other the belief is shared by many. Do I understand you correctly?

A. That is one, and a very strong differentiation between the two.

Q. Do you consider that, in judging of the acts of a man who is now living, and has always, or for many years, lived in a civilized Christian community, your judgment or decision should be at all affected by the

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opinions that may be entertained by millions of uncivilized and unchristian people?

A. He may have lived among the very people who held these doctrines, and been converted to them there, or gained his notions of them there. If he had lived all his life in a civilized Christian community, and had read nothing on the subject, and his mind was not of an imaginative character, or his imagination was not easily affected, then I might think it singular. But if he was of an imaginative or speculative mind, and he was suddenly attracted, or attracted by specious writings on the subject, he might for a time entertain such a belief, and such circumstances would influence very much my opinion.

Q. I am not talking of the books that he had read?

A. Well, if he had lived among such people and adopted their notions.

Q. Assuming that he had never lived among those millions of people that entertain that belief, would you not then consider it a personal matter to himself, or, as you express it, to say the least, singular?

A. Yes, sir; I should think it singular.

Q. Do you think that your judgment should be affected at all in judging of the case that has occurred here in our midst, in a Christian and civilized community, in this nineteenth century, by the belief that may be entertained at present by the Brahmins?

A. It would not be.

Q. So, whether the Brahmins believed in this or not, it would not make much difference to you in considering it?

A. Not at all; I merely mentioned that as historical, and as an illustration of some of my definitions.

Q. Where are the millions that believe it outside of the Brahmins and East Indians, generally?

A. I am merely repeating history—I do not wish to be understood as indorsing it—it is said that many of

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the Indians of our own country believe it; that the Indians of Central America believe it. I am not able to state the fact to you. I have not been able to satisfy myself personally.

Q. Then, except with reference to these Indians—and you have no knowledge of that yourself—you know of no people outside of the Brahmins that entertain that belief as a class or nation—a large number of people—at the present date?

A. I can not recall any for the moment. I beg your pardon—I think I stated that Fourier and his disciples were inclined somewhat to that belief—indeed, I had a reference to it.

Q. Are you able to state that it was ever the religious belief of Fourier, or of any of his disciples, that the soul of man went into animals?

A. I am not able to state that. I don't know what his religious belief was.

Q. Are you able to state that he ever taught that as a form of religious belief?

A. I can not say that I am.

Q. I understood you to say the other day that in all your wide and varied experience as a man of science, you had never met one single man or woman who entertained this belief?

A. Never, that I recollect.

Q. It is, therefore, so far as your opinion and experience goes, a singular belief?

A. Yes, sir.

Q. Is it, or is it not, in your judgment, an extravagant belief for any person?

A. Yes.

Q. Whenever a person conceives something extravagant to exist, which has, in fact, no existence, and he is incapable of being reasoned out of this false belief, does it, or does it not, in your judgment, constitute, so far as that particular point goes, insanity?

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A. No, sir.

Q. You spoke of the religion of the Egyptians—the Egyptians worshiped animals, did they not?

A. I believe so.

Q. They worshiped an ox?

A. Yes.

Q. If you knew of a man of mature age, and fair intelligence, in the city of New York, who said his prayers to an ox every morning, would you consider that a delusion or not?

A. No.

Q. And you would not consider the belief that "the Divinity that shapes our ends," resided in that ox, a delusion?

A. Not an insane delusion.

Q. I was asking if you would consider it a delusion or not?

A. My answer was that it was not an insane delusion.

Q. That is not a lawyer-like answer, though perhaps, scientific. I am not asking about insane delusions, but whether you believe it to be a delusion or not?

A. Not a delusion, according to my definition.

Q. Then will you modify your definition and make it fit this case, and call it a delusion?

A. It is a delusive idea that he has; I will say that.

Q. Would you not define a delusion to be a delusive idea—is not that a very good definition of a delusion?

A. Of one kind of delusion it may be, but not of an insane delusion.

* * * * *

Cross-examined by Mr. NILES:

Q. I want to know what is an unsound mind, in your view?

A. A mind that is not sound.

Q. My question is, what is an unsound mind?

A. I say a mind that is not sound.

Q. When is a mind not sound?

A. When unsound.

Q. Are those the best answers you can give to the questions?

A. I can give you illustrations in answer to the questions, which will explain my answers.

Q. Are those the best answers you can give to the questions?

A. I can elaborate by illustration of unsoundness of mind, probably.

Q. Will you answer me the question in any way, what is, in your judgment, an unsound mind?

A. It is difficult, sir, to give you a definite definition upon the subject; but I can answer you if you will permit me, by illustrating the various cases of unsoundness of mind. I wish to answer your question fully and fairly, but any definition which I could give you would, I feel confident, fall entirely short of what you want to learn from me, and that is why I make the answer that I do.

Q. Give us one example?

A. When a man is suffering from *dementia* or enfeeblement of mind. Unsoundness of mind is any departure from the normal or natural condition of mind.

Q. Then it is any departure from the right reason that ought to reign in a human mind, is not it?

A. Well, then, I have got to determine what the right reason is. There is no instance of perfect soundness of mind.

Q. Let it be what it may, I ask if, in your judgment, unsoundness is a departure from right reason?

A. Not necessarily from reason, because there may be a departure in the affective faculties. It is taking mind as a whole, made up of different parts, as a complex article, and any departure from its normal condition constitutes unsoundness. There are different degrees of unsoundness. The mind is made up of various faculties, and departure from the soundness, or assumed

soundness, of any one of those faculties, constitutes a degree of unsoundness of mind. For example, there is *dementia* or feebleness of mind. There may be an exaltation of some of the faculties, and then there is the maniacal condition. It is a departure whether in excess or diminution, *plus* or *minus*.

Q. Take the very illustration of the belief of your church, as you have stated here, you believe it because you have been taught it, without having given your personal thought to its investigation?

A. Yes, sir.

Q. Is not that the case with the great mass of men, and was not it at the time of Pythagoras?

A. I believe it to be the general cause of belief—it is simply a notional assent, and not conviction from the result of investigation and study—it is a religious belief.

Q. Now, at the time of Pythagoras, the great mass of men believed that the sun went round the world every day, did they not?

A. Yes; and they assented to that—gave a notional assent.

Q. And it did not prove that they were insane?

A. It did not prove that they were insane or had any insane delusion.

Q. Or that they were unsound of mind?

A. Or unsound of mind, or had an insane delusion.

Q. Supposing one of your associates in the medical profession, who had investigated that subject carefully, persisted in the belief to-day, that the sun went around the world every day—would you consider it an indication of any unsoundness?

A. No, I would not.

Q. You would consider him as perfectly sound and sane?

A. I should see no reason why not.

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Q. In those days there was a universal belief in Satyrs, was not there?

A. Yes, sir.

Q. Now, supposing a man should persist in believing that they existed here in the park to-day, and upon his death-bed should make a will dependent upon that belief, would you regard it as any indication that he was unsound in his mind.

A. I should think he had a speculative, imaginative mind, but it would not necessarily constitute unsoundness of mind.

Q. In other words, you would consider him a good subject for a poet?

A. Yes, sir.

Q. Now, in regard to delusion, supposing one of the gentlemen here insisted warmly that last night at midnight, in the woods on Long Island, he saw a bear, where you knew no bear was, would you call that a delusion or not?

A. How could I know that there was no bear there?

Q. I was supposing that you knew there was no bear there.

A. Of course, if I was with him and saw no bear, I should say that he had an illusion or an hallucination—it does not constitute a delusion.

Q. Now, supposing he persisted with warmth that there was one in that corner of this room at mid-day, what would you call it?

A. And I knew that there was nothing of the kind? It would be an illusion or hallucination—an illusion if there was something which he supposed was the bear, and an hallucination if there was nothing there—but not a delusion.

Q. Would you consider that an indication of unsoundness?

A. No, not necessarily. I might see the same thing.

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Persons looking at the clouds see them representing animals, and persist that they see it.

Q. I ask about this specific thing—you would not consider that any indication of unsoundness?

A. No, sir.

Q. Now, when those things result from defective physical construction, eyesight, or anything of that kind, with a sound mind behind them, does not the person always know that it is a misapprehension, and that it only seems to exist—does not he always know that it is a mere seeming?

A. I have found it very difficult with persons of perfectly sound mind, affected with double vision, for example, to satisfy them that they saw only one object. They have insisted with as much persistency as a person suffering from an insane delusion.

Q. Now, what would you call that?

A. Double vision proceeds from some physical derangement of the organ of sight, or of the central organ—the visual axes are deranged and disturbed.

Q. You say that while the mind remains perfectly clear and sound, people persist in that belief that there are two things?

A. I say that it is often difficult to induce them not to believe their own senses.

Q. But is it impossible?

A. No.

Q. The reason I ask that is, that Mr. Coudert asked you if the mind was incapable of being led to believe the contrary, whether you did consider it any indication of unsoundness. His word was "incapable" of being taught to the contrary, or led to believe to the contrary. Would you consider that any indication of unsoundness?

A. May I ask you to repeat that.

Q. Supposing that any gentleman present insisted that there was a bear in that corner of the room, and was incapable of being led to believe to the contrary,

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would you consider it any indication of unsoundness?

A. I should consider that at the time he was laboring under an hallucination or illusion, and as soon as that passed off, then he could be convinced—its duration might be temporary.

Q. Suppose he was incapable of being led to believe to the contrary?

A. It is a matter of time.

Q. I don't ask you—incapable in a minute or an hour of being led to believe to the contrary.

A. If he persisted in it I should say his mind was unsound to that extent.

Re-direct by Mr. GERRY :

Q. The learned counsel mentioned to you in his cross-examination the celebrated case of Hadfield. Did you ever see Hadfield personally yourself?

A. I saw him in Bethlehem Hospital in July, 1839, and passed part of an hour with him—conversing with him.

Q. That was long after the shooting took place?

A. It was nearly forty years that he and the physician, I think, told me that he had been there. I recollect from this circumstance that it was over thirty-six years—from his saying to me that the greatest event of his life since his being in the asylum had occurred within a day or two before I saw him; that for the first time he had been taken down into the hall and shown, as he expressed it, the figures or statues which were there, and that for thirty-six years he had not seen them before. He was then not insane, though of weak mind; not imbecile, but of a weak mind at that time; and I was told by the physician of the establishment that he had always been of feeble mind, but had shown no signs, if I recollect right, of actual, positive, mental derangement; nothing except feebleness of mind since he had been in the institution. He wrote verses, which he

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showed me ; and he had a stuffed cat and a great number of birds, and I had quite an interesting conversation with him. I tried to bring him on the subject of the attempt upon the king, but he declined to say anything about that. He was in feeble health at the time. I recollect him perfectly, as if it was yesterday. He was a small man, and wore a sandy wig. He died, I think, within a year or two after that.

[Here followed some questions as to the characteristics of Frenchmen.]

Q. Suppose that a man had been shown for some time, when discussing theological subjects, to have become greatly excited in regard to them, and that man were subsequently to die of an illness which lasted some twenty days, that during that entire illness there had been no indication to his medical attendant either of any lesion of the brain or functional insanity, so to speak, but that in the language of the medical attendant his mind was clear to the last, should you regard the mere fact of any excitability exhibited on his part, when speaking on theological subjects, as an indication that there was any irrationality, mental unsoundness, insane delusion, or mental derangement on his part?

A. No, sir ; I should not.

WILLIAM A. HAMMOND, M. D., called for proponents, sworn.

Mr. Gerry, after the same preliminary questions as in the case of the last witness, asked :

Q. What do you understand by *insane* delusion ? Give a brief definition ?

A. By *insane* delusion I understand a delusion out of which the possessor can not be reasoned by evidence which would convince the majority of mankind of healthy minds.

Q. Give an illustration of it if you please ?

A. Well, if a man was to believe that that book [the Bible on the stenographer's desk] was a woman, and

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persisted in his belief against the evidence of his senses, or against the evidence of the senses of other persons, he would have an insane delusion.

Q. Then, as I understand you, in order to constitute an insane delusion there must be coupled with the belief, the belief in existing facts—the belief must be in reference to something which is a matter of fact, and susceptible of proof through the medium of the senses?

A. I think so; yes. A simple delusion is merely an erroneous or false belief, and that does not necessarily involve insanity. It is only when the person persists in a false belief against such testimony as suffices to convince a healthy mind, that it becomes insane delusion.

Q. I want to read a definition to you to see whether you, as a medical man, agree with it. It is from *Seaman's Friend Society v. Hopper*, 33 N. Y. 624: "If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself however logically upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion."

A. That is exactly what I believe.

Q. And delusion in that sense is insanity—do you go to that extent?

A. Yes.

Q. "Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act, and speak like a sensible man?"

A. Yes, sir.

Q. What is an illusion?

A. An illusion is a false perception.

Q. How does it differ from an hallucination—what is an hallucination?

A. An hallucination is likewise a false perception, but it is not based upon a reality. An illusion is based

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upon a reality. If I should take that thermometer hanging there to be an angel I should have an illusion, but if I should imagine that there was an angel on the wall when there was nothing there that I could convert into an angel, that would be an hallucination.

Q. How would a delusion differ from those two?

A. A delusion involves the intellect; hallucination or illusion does not. If I believe firmly that that thermometer is converted into an angel, and act in accordance with the belief, I have a delusion.

Q. That is an insane delusion?

A. If I am not capable of being reasoned out of it, then it is an insane delusion. I might hold it for a moment or two from some temporary increase of blood in my head, for instance, or from a blow, or from having eaten an indigestible dinner.

Q. How does a delusion differ from a mere belief—what do you understand a belief to be?

A. By belief I understand the acceptance by the intellect of any proposition as true upon argument or proof but without certain knowledge of its truth. In a good many cases I think that belief is confounded with knowledge and faith, whereas I think the three things are very essentially distinct. Belief requires some evidence, faith requires no evidence whatever, and knowledge requires actual proof. Belief differs from delusion in no essential respect whatever. A delusion is simply an erroneous belief. It simply differs in the starting point; that is all.

Q. How does a belief differ from an insane delusion?

A. Because a belief is based upon circumstances which are not such as evidence insanity in the possessor.

Q. Whereas in an insane delusion there is always something besides the mere expression of belief which indicates the insanity?

A. A man may have an insane delusion, without any other evidence of insanity whatever.

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Q. Suppose a man was to express a belief at variance with that generally entertained by those of his fellow beings with whom he more immediately lived, and among whom he moved, would that expression of belief, in your judgment as a medical man, indicate the existence of any mental disease?

A. It would depend entirely upon what the belief was. If it was in regard to matters of fact it would—if in regard to matters of faith or religion it would not, no matter what it was.

Q. Unless it was in regard to matters of fact, would it indicate in your judgment any irrationality, defect of the powers of reasoning, mental unsoundness or mental derangement in such a man?

A. Not of itself. But if it were exceedingly absurd—if, for instance, a woman were to think that she was pregnant with a second Christ, that would be a matter of fact which would at once show her insanity. But if she was to take up some erroneous idea, no matter how absurd, and believe it firmly, that of itself would not be sufficient to show that she was insane. If she was insane, in all probability, she would give other evidence of it. You could not prove it by that belief alone.

Q. [To a question substantially the same as Q. [1] on p. 133 the witness answered]:

A. It would not. No matter what the belief was, if it was simply in regard to matters of faith, incapable of proof, it would not necessarily involve insanity.

Q. [The next question was substantially the same as Q. [2] on p. 134.]

A. The mere fact of his renouncing such a belief would show that it was not an insane delusion on his part.

Q. Why?

A. Because insane delusions are remarkably persistent, and are not renounced in that way.

Q. Suppose, in addition to the facts which I have stated, that the medical man who attended him during

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the entire time of his last illness, had frequent opportunities of conversing with him, and of examining his condition, and was unable to detect an organic lesion of the brain, or any mental disturbance whatever, and should pronounce his mind, in his judgment, to have been clear to the last, what would be your opinion in reference to that—would it strengthen or weaken the opinion you have stated?

A. I should think he was sane.

Q. You have no doubt of it?

A. No doubt whatever, for the reason that very much more absurd beliefs than that are entertained. We simply regard them as somewhat strange, because we are not so familiar with them as with some others. There are beliefs entertained which are fully as absurd, if I may use that expression, by people around us with whom we mingle every day of our lives and which yet do not excite astonishment, and we do not think the people insane. We have the Spiritualists, Mormons, Muggletonians, Shakers, Swedenborgians, and others, who hold very erratic notions, far more absurd, to my mind, than that of metempsychosis, and yet we do not consider them insane, and mainly for the reason that no religious belief is evidence of a man's insanity.

Q. [The next question was substantially the same as Q. [3] on p. 134.]

A. I would not; because if it had been actuated by any delusion, the delusion in all probability, in a very great majority of cases, would have been shown in the will—he would have expressed something in the will in regard to his religious belief.

Q. [The next question was like Q. [4] on p. 135.]

A. Not in the least.

Q. [The next question was substantially like Q. [5] on p. 135.]

A. I would not as you state it. But if he had been unduly prejudiced against his family, if he had had any

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delusion in regard to them, and had estranged his property from them, I should regard it as some evidence of his insanity. But from the fact of his having been separated from them twenty-five years, and having had no intercourse with them, and that he had probably lost all affection for them, as a man naturally would under such circumstances to a great extent, I should not regard it as any evidence of insanity.

Q. Suppose that, in addition to the circumstances stated in my last question, it further appeared that this family of his, twenty-five years before, had voluntarily disowned all connection with him, treating him as an outcast from society, refusing to afford him any assistance whatever when he was in poverty, they being able to assist him, would the facts I have related then indicate to you any irrationality whatever?

A. It would strengthen the opinion I have already given.

Q. Suppose that during the whole of these twenty-five years not one of this family of his had ever approached him directly or indirectly by letter, had paid no attention whatever to his existence, and had practically treated him as dead, and that he had always, on every occasion, when speaking of his family, evidenced a dislike to recur to the fact that he had ever had a family, would that alter the conviction that you have expressed?

A. No, it would not, unless his dislike was clearly based upon a false notion in regard to them.

Q. I am assuming a case where he never expressed any ground of dislike at all, but where facts had occurred such as I have stated?

A. It would not.

Q. Suppose a Frenchman, about 60 years of age, lively in his temperament, pleasant and agreeable in his manner, but retiring in his disposition, a simple, economical man, who often took a twenty-five cent piece or a

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dime and gave it to the poor ; who was very industrious, and worked hard from morning to night ; who was very intelligent, had extraordinary good sense, was a workman, and lived in a cheap boarding-house with other workmen ; who, although wealthy, would not live in an expensive hotel, because there was too much ceremony, and he did not consider himself fit for it, to use his own language, he preferring to live with workmen, as he was one himself--if such a man should at times get excited when late in reaching his boarding-house, or when detained in getting to his work, which consisted in superintending the building of his own houses, or should exhibit excitement when talking about theology, or a certain metaphysical or other belief which he entertained, especially when teased about such subjects, becoming greatly excited--I ask whether any such conduct as this on his part, assuming these facts to be true, would indicate to you, as a medical man, any mental unsoundness, insane delusion, mental derangement or unsoundness of mind ?

A. It would not ; for the reason that I have known such circumstances to exist frequently with persons who were manifestly perfectly sane.

Q. Suppose such a man as has been described to you in my last question, without wife, child, or parent ; who had been separated from his family for over twenty years, and who was very fond of animals and disliked to see them ill-treated, should have only two very intimate friends, who had been acquainted with him for fifteen or sixteen years ; that he had never spoken on the subject of metempsychosis, or the doctrine of the transmigration of souls, to one of these friends, and that he had not mentioned it to the other for thirteen years preceding his death, but that he had referred to that subject occasionally to others who were slightly acquainted with him ; that in his last sickness, the duration of which was eighteen days or thereabouts,

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the disease of which he died being bronchial pneumonia, without any indications, however, of any lesion of the brain, his mind being clear to the last ; he never referred to the subject mentioned either to the doctor who attended him, or to the priest who administered the last rites of the Church of Rome to him—suppose such a man should make a will giving clear directions in regard to all the property he owned, remembering at the time of making the will the precise numbers of his houses, and should leave all his property, amounting to nearly one hundred and fifty thousand dollars, to a society for the prevention of cruelty to animals “for the furtherance of the humane objects of such society”—I ask you whether you would consider such a man at the time of making such will, assuming it to have been made six days before his death, to have been irrational or laboring under any mental delusion, mental derangement, or mental unsoundness ?

A. There is nothing whatever in your question which, if true, would indicate the existence of insanity in any form. In fact I should doubt very much whether he even entertained the belief in the doctrine of metempsychosis. He might have had a dim impression, perhaps, at times, that it was true, as people have in regard to various theological dogmas ; but as to his believing it firmly and fixedly, I am very sure he did not, if that is a correct statement of the facts.

Q. I understand you to say that there was no insane delusion on his part at that time, in your judgment ?

A. No.

Q. In the course of your professional study in connection with the subject of insanity, have you had occasion to examine, and have you examined, the subject of metempsychosis, or the theory of the transmigration of souls, as bearing upon the question of alleged insane delusions connected therewith ; and have you also ex-

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amined the subject of metaphysical and religious beliefs in connection with the subject of insanity?

A. I have, for a number of years past—certainly over twenty years ago I began my study of those subjects.

Q. Will you state, if you please, as concisely as you can, the results of your examination upon these subjects, more especially as bearing upon the question of the sanity or rationality of those who have entertained, or professed to entertain, any such beliefs or theories?

A. Briefly, the answer that I should make to that question would be mainly a reiteration of what I have already stated, and the answer I gave to a former question is based upon my study of those subjects; and that is, that no religious belief, no matter how absurd it may be, is of itself sufficient evidence of a man's insanity. I base that answer upon the investigation of a large number of cases, and likewise upon a very thorough reading of the subject. As regards the doctrine of the transmigration of souls, and the doctrine of metempsychosis—because, I think, there is a distinction between them—both have been held at various times of the world's history by the most enlightened nations then on the earth. They were, and are to the present day, held in some form or other, by the Hindoos, by the people of Siam, by the people of Thibet, by the Chinese. They were held by the ancient Egyptians, Greeks, Persians, Scythians, by the Druids, and by the Celts generally to some extent. They are held now by the North American and South American Indians, as I know from my own knowledge in regard the North American Indians. They were held by various heretical sects among the early Christians; and then in the twelfth century by the Gnostics, and by the Manicheans, who were early heretical sects. They have likewise been held by several distinguished European men,

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Pythagoras, Plato, Pericles, Plotinus, by Origen, by Fourier, by Leibnitz, by Lessing, and among writers of the present day by Pierre Leroux; and Fourier has written extensively upon that subject. I know of my own knowledge that they are held by people of the present day in the city of New York. I may state that Mr. Aiger, in his very learned work "The Doctrine of a Future State," states from his own knowledge that those beliefs, in some form or other, are largely held in this country and Europe at the present day.

Q. You stated that the belief was entertained by the Brahmins, do you know how many of those people there are at the present time?

A. There are about two hundred millions; and there are about four hundred millions Buddhists who also hold it. The belief is held by millions of the human race at the present day.

Q. What is the particular belief of Brahma and Buddha upon that subject generally?

A. The particular belief of the Buddhists is that at death the soul goes into matter of all forms, animal, vegetable, and mineral; and it is to that form of belief that the term of transmigration of souls is more properly applied. The doctrine as held by the Egyptians, and I think by the Brahmins and by the ancient Greeks, by Plato, Pythagoras, and others, restricts the passage of the soul into animal forms; but the Buddhists hold that it goes into all forms of matter.

Q. That is the distinction between metempsychosis and the doctrine of the transmigration of souls?

A. Yes, sir.

Q. Would you consider a man who entertained such a belief at the present day irrational?

A. I might consider him irrational, but I should not consider him insane. People are irrational every day of their lives.

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Q. Do you remember whether this belief was entertained at any time by the Pharisees ?

A. It was held by the Pharisees and by certain heretical sects of the Jews, and is supported in the Talmud, and in the writings of Philo, a very distinguished Jew of a very early period.

Q. Do you recollect whether anything occurred in the Fifth Council of Constantinople ?

A. It was in that Council that it was denounced. But it was held by the Manicheans and Gnostics in spite of the decrees of any Council.

Q. In the course of your examination of this subject, have you had occasion to read carefully the writings of any of the men that you have mentioned, such as Plato, for instance, in which he has expressed this idea of the metempsychosis and transmigration of souls ?

A. I have read them many years ago. I have read Plato very thoroughly, I think.

Q. Do not persons laboring under insane delusions ordinarily indicate in their writings some trace of the delusions ?

A. I should say that they invariably do, or at least, with remarkably few exceptions.

Q. As a medical man did you discover anything in those passages in the writings of those persons that you have mentioned, who entertained this belief, indicating to you the existence in the minds of the writers of any mental unsoundness or insane delusion ?

A. In none of them, unless in the writings of Fourier, which I have only read to a limited extent. I do not consider that Fourier was insane at all ; I think he was eccentric ; he was upon the border of insanity ; he was impractical ; but I am very far from expressing the opinion that he was insane. An eccentricity is to a certain extent mental unsoundness.

Cross-examined by Mr. COUDERT :

Q. In giving the answers that you gave to my

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brother, Mr. Gerry, where he recited certain facts, of course you assumed those facts to be truly stated?

A. Of course.

Q. And you assumed that there were no other facts inconsistent with that statement of facts?

A. Certainly.

Q. Might there not be such circumstances existing that the actual belief of a man in metempsychosis, followed up by acts based and predicated upon that belief, might lead you to believe him to be insane in whole or in part?

A. Undoubtedly; just as the belief in Christianity would sometimes.

Q. Is there any case in which the belief in Christianity would induce you to believe a man to be insane?

A. Yes.

Q. Will you state an instance?

A. I have instances in my consulting room every week of my life, I think.

Q. Where belief in Christianity is evidence of insanity?

A. Yes.

Q. Will you give us an instance?

A. I can give one that happened to me this morning, of a lady who came to my office, who firmly believed that she had committed the unpardonable sin, which condition of mind was brought on merely from excessive application to her religious duties.

Q. I understand you now. That you do not consider to be an evidence of her belief in Christianity?

A. No. I say entirely independent of belief.

Q. It is an overburdened conscience that had become insane?

A. Yes, sir.

Q. Might you not consider that a belief that the human soul is going into the body of an animal, in connection with other circumstances, indicated insanity?

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A. Undoubtedly.

Q. Then there might be a statement of facts inconsistent with the statement supposed by the other side which would, of course, modify your judgment?

A. Undoubtedly.

Q. You say that there is no form of religious belief, however absurd, that, in your mind, would indicate insanity?

A. No form of religious belief based upon matters of faith.

Q. How is it with regard to what the learned doctor who preceded you calls a notional belief; that you distinguish from a matter of faith, do you not?

A. I did not hear Dr. Clymer's evidence upon that subject.

Q. You know what a notional belief is, as distinguished from a matter of faith, do you not?

A. Well, I have an idea of what a notional belief is, but it may not accord with Dr. Clymer's.

Q. In other words, you doctors disagree sometimes?

A. Just like other people.

Q. Proverbially?

A. I don't think we do more than preachers or lawyers?

Q. You distinguish between matters of faith and matters of fact—is it not sometimes a little difficult to draw the line between what may be a matter of faith and a matter of fact?

A. I think not.

Q. For instance, suppose a man believes theoretically or metaphysically, that after death his soul will go into an animal, that would be a matter of faith; there is no fact about that?

A. No.

Q. But supposing that you are about putting an end to the existence of a cat that is suffering from a broken limb, or something of that kind, and he strenuously in-

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sists that you shall not do it, because he says there is a soul of a man in it, is not that a matter of fact?

A. No; it is a matter of faith entirely. If he should say, "Don't kill that cat, for I saw the soul of a man go into it," that would be a matter of fact, and would evidence his insanity.

Q. But if he simply observes, "There is a cat, don't kill it, because there is a soul of a man in it," you still consider it a matter of faith, and it would not shake you as to his sanity?

A. Not in the slightest.

Q. You would still consider him sane?

A. He might be insane, but that circumstance itself would not show his insanity.

Q. But would it not be one link in the chain if there were other circumstances pointing to the same end?

A. If there were other circumstances it might be a link; probably would.

Q. I understand you to say that eccentricity goes out upon the border line. Is it not at times difficult to draw the line between eccentricity and insanity?

A. It sometimes is extremely difficult.

Q. Understand that I am not now speaking of general insanity, but of a person who is sound on all subjects but one particular one—that is monomania?

A. Yes, sir.

Q. It is, then, extremely difficult at times to draw the line?

A. It is extremely difficult. I presume the great point of distinction is that the ideas of an eccentric person are generally connected with himself—almost entirely so, and are of such a character as to bring him prominently before his fellow-men—to make him notorious.

Q. Would the fact that a man of mature years and fair intelligence, who had on many occasions expressed a firm belief in metempsychosis, and when sick, within

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a few hours of his death, making a will leaving all his estate to a society for the protection of animals, ignoring all the claims upon his bounty, ignoring all the usual channels of charity in which a dying man is apt to let his money go, ignoring the claims of his kin, and assuming that he had relatives that were very near to him; assuming, moreover, that that man, three days before, had made another will in which he provided for friends, or persons who claimed to be his friends, and assuming that that change was made without any apparent cause or reason, and within a few days or hours of his death—would you not consider that those circumstances were of themselves some indication that the man's mind was not sound?

A. The fact of his having made a will three days before, which your question leads me to suppose is regarded as a sane will, and then three days after making a will which is now regarded as insane, would show that whatever insanity he was affected with had taken its origin within the three days; and such a will of itself, I simply hearing the statement of facts as you have given them, without having any opportunity to inspect the will, or knowing any of the attending circumstances, might excite some suspicion in my mind. It would excite suspicion no matter what institution he left his property to. When a man disowns his relatives it is some evidence that things are not right; but it may all be explained by the attending circumstances.

Q. Now, suppose, that at the time that this man, whose case I have supposed a moment ago, made this will now in controversy, he declared that the will he had made three days before, was made when he was incompetent, when his mind was not right, when he did not understand what he was about—would that be an additional circumstance of suspicion?

A. He declares that, when he makes the last will

Q. Yes; and he is three days nearer death?

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A. And he declares emphatically that his mind was not right when he made the first will?

Q. That he did not understand the first. Would you not consider that also a suspicious circumstance?

A. I should not know whether the suspicion should attach to the first will or the second.

Q. But it would attach to one of the two?

A. Yes; to some extent; but I should not know whether he was right when he executed the second will or the first will.

[Here followed a series of questions intended to show that witness had not correctly ascertained or stated the opinion of Origen.]

Q. Among the data that were contained in the question put by my learned friend, it was stated that this man's family had renounced him—had never approached him by letter or otherwise—and had refused to aid him when it was in their power to do it. Suppose that part of the statement in the question was untrue, might not your opinion be modified; or do you disregard that entirely, and consider it of no consequence that they should have renounced him, and refused to approach him or have anything to do with him?

A. It would not modify my opinion even if there had been no active refusal on their part. The mere fact of the separation for twenty-five years from relatives would, I think, lessen in a very material degree the ordinary love which a man feels for his relatives, especially if they are not very near relations—not children.

Q. Suppose he had very near relations, and suppose some were young children, not his own, but a brother's or sister's, who, in the nature of things, could have done him no possible harm, and suppose none of those relatives had ever done him an injury, would you still think it natural that they should not come back to

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his memory when he was making an instrument of this kind, and he was about to die ?

A. I think it is natural but unusual, although I have seen so many cases where all love was dissipated by absence, that I should not attach much importance to that fact.

Q. Still it is unusual ?

A. Yes, sir.

Q. Would not the coincidence of many unusual circumstances aid you in arriving at the conclusion that the man's mind was unsound ?

A. It would depend upon the character of each individual circumstance. One of itself might be sufficient, and yet if they are not of great moment, a thousand would not be sufficient.

Q. But one unusual one might suffice ?

A. Yes, sir.

Q. Do I understand you to say that a belief in metempsychosis prevails in the city of New York ?

A. I do not say it prevails ; I say it is held in the city of New York by some persons.

* * * * *

Elbridge T. Gerry, in support of the will, contended :—I. No insane delusion whatever was entertained by the testator (*Seguine v. Seguine*, 4 *Abb. Ct. App. Dec.*, 191 ; S. C., 3 *Keyes*, 663 ; *Gass v. Gass*, 3 *Humph. (Tenn.)*, 278 ; *Batsford v. Alderson*, 3 *Hagg. Ecc.*, 574 ; *Thompson v. Quimby*, 2 *Bradf.*, 449 ; *University of London v. Yarrow*, 23 *Beav.*, 159 ; S. C., 2 *Jurist, N. S.*, 1125 ; S. C., affirmed on appeal, 1 *De Gex & J.*, 72 ; S. C., 26 *Law Jour., Ch.*, 430 ; *Marshall v. Means*, 3 *Jurist, N. S.*, 790).

II. The bequest to the society was valid. 1. It has power to take by bequest (*Sherwood v. Am. Bible Society*, 4 *Abb. Ct. App. Dec.*, 227 ; S. C., 1 *Keyes*, 561). 2. It was created by special charter, and not organ-

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ized under the benevolent societies' act; so that bequests to it of any amount are valid (1 *Laws of* 1863, ch. 469, p. 1019; *Laws of* 1848, ch. 319, § 6, p. 348; *Harris v. Slaght*,* 46 *Barb.*, 470).

III. There was no equitable conversion of the personality into realty upon the death of the testator. (1) The direction to his executors affected only the mode of investment (*Dorland v. Dorland*, 2 *Barb.*, 81). (2) If the investment clause constitutes a restriction upon the power of alienation, it is repugnant to the prior absolute gift and void (*Wetmore v. Parker*, 52 *N. Y.*, 459; *Manice v. Manice*, 43 *Id.*, 384; *Schettler v. Smith*, 41 *Id.*, 328; *Harrison v. Harrison*, 36 *Id.*, 543; *Lovett v. Gillender*, 35 *Id.*, 617; *Oxley v. Lane*, *Id.*, 240; *Post v. Hover*, 33 *Id.*, 596; *Leonard v. Burr*, 18 *Id.*, 103; *Savage v. Burnham*, 17 *Id.*, 561). (3) The doctrine of equitable conversion proceeds upon the principle, that what was intended to be done, is in equity regarded as done. It is invoked only to sustain a bequest—never to overturn it (*Lovett v. Kingsland*, 44 *Barb.*, 564; *Walker v. Denne*, 2 *Vesey, Jr.*, 176; *Wheldale v. Partridge*, 5 *Vesey, Jr.* [Am. ed.], 197, note; 1 *Story Eq. Jur.*, § 64). (4) The power of invoking the doctrine is vested in the beneficiary under the will—not in a contestant; and the beneficiary may elect to take the property as it is and prevent its conversion (2 *Story Eq. Jur.*, § 793; 1 *Roper on Leg.*, 372; *Rashleigh v. Master*, 1 *Vesey, Jr.*, 201, note a.; *Kirkman v. Miles*, 13 *Id.*, 338; *Reed v. Underhill*, 12 *Barb.*, 117; *Cruse v. Barley*, 3 *P. Wms.*, 22; *Craig v. Leslie*, 3 *Wheat.*, 577, 585; *Newby v. Skinner*, 1 *Dev. & Bat. Eq.*, 488; *Shadforth v. Temple*, 10 *Simons*, 184). (5) In any aspect of the case the clause of the will applies only to *money* and not to other personality (*Mann v. Mann*, 1 *Johns. Ch.*, 231; S.C., affirmed in 14

* See decision on appeal in *Harris v. Am. Bible Soc.* (2 *Abb. Ct. App. Dec.*, 316).

Johns., 1 ; *Cowling v. Cowling*, 26 *Bear.*, 449 ; *Slingsly v. Grainger*, 5 *Jurist, N. S.*, 1111 ; *In re Powell*, *Id.*, 331 ; *Gibbs v. Lawrence*, 7 *Id.*, 137 ; *Stein v. Ritherdon*, 37 *Law Jour. Ch.*, 369 ; *Lowe v. Thomas*, 5 *De G., M. & G.*, 315 ; *Beck v. McGinnis*, 9 *Barb.*, 59 ; *Gosden v. Dotterill*, 1 *Myl. & K.*, 56 ; *Ommaney v. Butcher*, *Turn. & R.*, 272).

IV. The society claims title to the lands covered by the devise, under a special act of the legislature (1 *Laws of 1871*, ch. 76). (1) That title is valid against all alien heirs of the testator, if any there are (*Heney v. Brooklyn Ben. Soc.*, 39 *N. Y.*, 334 ; *Larreau v. Davignon*, 15 *Abb. Pr. N. S.*, 367 ; *Kennedy v. Wood*, 20 *Wend.*, 230). (2) The act is a valid grant by the State, of the lands devised, if the devise itself be inoperative, and its form is sanctioned by precedent (*Laws of 1852*, ch. 10, 12, 295 ; *Wadsworth v. Wadsworth*, 12 *N. Y.* [2 *Kern.*], 379 ; *Trustees of N. Y. P. E. School*, 31 *Id.*, 574 ; *Bascom v. Albertson*, 34 *Id.*, 600 ; *Swasey v. Am. Bible Soc.*, 57 *Maine*, 523).

V. The legatees under the prior will have no standing in court, as they are not within the enumeration of the statute (1 *Laws of 1870*, ch. 379, § 11).

John G. Boyd, Leon Abbett, and W. J. A. Fuller,
for the executor Campbell.

Frederic R. Coudert, in behalf of the Consul-General of France and the alleged heirs, insisted : I. The will violates the statute against perpetuities (1 *R. S.*, 672, § 15 ; 4 *Kent Com.*, 283 ; 2 *Burr.*, 873 ; *Everitt v. Everitt*, 29 *N. Y.*, 39, 71 ; *Hone v. Van Schaick*, 20 *Wend.*, 564 ; *Beekman v. Bonsor*, * 23 *N. Y.*, 298 ; *Adams v. Perry*, 43 *Id.*, 487).

II. The void directions can not be disregarded † *Beekman v. Bonsor*, *supra*).

* The decision below in this case is reported as *Beekman v. People*, 27 *Barb.*, 260.

† Compare *Van Nostrand v. Moore*, 52 *N. Y.*, 12.

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III. The devisee had no capacity to take by devise (2 *Rev. Stat.*, 55; *Owens v. Miss. Soc.*, 14 *N. Y.*, 380; *McCortee v. Orphan Asylum Soc.*, 9 *Cowen*, 437). And no subsequent legislation could cure the defect (*White v. Howard*, 52 *Barb.*, 294; affirmed in 46 *N. Y.* 144; *Hough v. Am. Baptist Miss. Union*, *Id.*, 682).*

IV. There was an equitable conversion of *all* the personalty into realty (*Owens v. Miss. Soc.*, *supra*; *Cutting v. Lincoln*, 9 *Abb. Pr. N. S.*, 440; *Craig v. Leslie*, 3 *Wheaton*, 563; *State v. Miltbank*, 2 *Harringt.*, 18; *Kane v. Gott*, 24 *Wend.*, 641; *King v. Woodhull*, 3 *Edw.*, 79; *Wright v. M. E. Church*, *Hoffm.*, 202).

V. The testator firmly believed in the doctrine of *metempsychosis*, and the testamentary act of the testator was the result of insane delusion (*Prichard on Insanity*, 15, 16, 65, 67; *Browne Religio Medici*, § 37; *Alger Doct. of Future State*, 86, 483, 484; 1 *Lecky Rationalism*, 40, 43, 70, 139; 1 *Mosheim Eccl. Hist.*, pt. 2. ch. 3, p. 90; 1 *Essai du Dogm. Cath.*, 126; *Enc. Brit. in verbo "Metempsychosis;"* 3 *Butler Philolog. and Philos. Works*, 245-8; 5 *Id.*, 166; 1 *Lecky Hist. European Morals*, 386; 7 *Southey Works*, 120, 381; 4 *Id.*, ch. 127; *Browne Med. Jour. of Insanity, Passion*: *Waring v. Waring*, 12 *Jurist*, 947; *S. C.*, 6 *Moore P. C.*, 341; *Smith v. Tebbitt*, *Law Rep.*, 1 *Prob. and Mat.* 398; 3 *Addams*, 79; 1 *Beck Med. Jour.*, 650; *Stanton v. Wetherwax*, 16 *Barb.*, 259; 6 *Serg. & R.* 56; *Hopper Will Case*, 33 *N. Y.*, 619; *Banks v. Goodfellow*, *Law Rep.*, 5 *Q. B.*, 549; *Redfield on Wills*, § 11; *Dew v. Clark*, 1 *Addams Ec.*, 279).

John K. Porter, and *W. W. Niles*, for the legatees under the prior will, contended:—I. These legatees have a statutory right to appear and contest the pro-

* See, also, *Leslie v. Marshall*, 31 *Barb.*, 560; *Downing v. Marshall*, 1 *Abb. Ct. App. Dec.*, 525.

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bate (Walsh v. Ryan, 1 *Bradf.*, 434; Turhune v. Brookfield, 5 *N. Y. Surr.*, 220; Foster v. Tyler, 7 *Paige*, 51). *

II. The revocation clause in the will propounded falls to the ground if the will is void (Denny v. Barton, 2 *Phillimore*, 577; *In re* Merritt, 1 *Swab. & Trist.*, 112; S. C., 4 *Jurist, N. S.*, 192; Powell v. Powell, *Law Rep.*, 1 *Prob. & Div.* 212; Lemage v. Goodban, *Id.*, 62; Van Wert v. Benedict, 1 *Bradf.* 121; Onions v. Tyler, 1 *P. Wms.*, 345).

III. The direction to invest, is an imperative order to convert into real estate the whole of the personalty (Prichard v. Prichard, *Law Rep.*, 11 *Equity*, 232, 235; Stocks v. Barre, 1 *H. R. V. Johnson*, 56; Grosvenor v. Durston, 25 *Beav.*, 99; Whately v. Spooner, 3 *Kay & Johnson*, 542; Waite v. Combes, 5 *De G. & Sm.*, 679; Morton v. Perry, 1 *Metc.* 448; Caldecott v. Caldecott, 1 *Younge & Col.*, 323; Cookson v. Reay, 5 *Beav.*, 22; Parker Mills v. Comm'r of Taxes, 23 *N. Y.*, 244; Bunn v. Vaughan, 1 *Abb. Ct. App. Dec.*, 253; S. C., 3 *Keyes*, 345; Tathem v. Drummond, 34 *Law Jour., Ch.*, 2).

IV. The illegality of a disposition has no effect upon the meaning of the testator's words; as the court will construe these according to their *plain* meaning (Gott v. Cook, 7 *Paige*, 521; Bulteel v. Plummer, *Law Rep.*, 6 *Chan. App.*, 165; Cattlin v. Brown, 11 *Hare*, 375; 1 *Jamran on Wills*, 267, 270, 274, note, n).

V. The will propounded creates a perpetual trust of the personal estate in the executors, which is void under the Revised Statutes (Adams v. Perry, 43 *N. Y.*, 497-9).

THE SURROGATE.—The deceased was a native of France, who came to this country about 1849, and became a citizen of the United States by acts of natural-

* See, also, Greeley's Will Case, 15 *Abb. Pr. N. S.*, 393.

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ization, and died at the age of over sixty years, at St. Vincent's Hospital, in this city, on February 20, 1871. He left a paper propounded as his last will and testament, bearing date and executed on the 14th day of that month, which is as follows:

"The Last Will and Testament of Louis Bonard."

"In the name of God, Amen. I, Louis Bonard, of the city of New York, being of sound mind and memory, and considering the uncertainty of this life, do therefore make, ordain, publish and declare this to be my last will and testament—that is to say: First: After all my lawful debts are paid and discharged, I give and bequeath and devise unto the "American Society for the Prevention of Cruelty to Animals," (of which said society Henry Bergh, Esquire, of the city of New York, is president, and for whom I have long entertained, and now entertain, the highest respect and admiration, he being a gentleman whose laudable, untiring and humane exertions on behalf of the dumb portion of God's creatures has elevated him in my estimation far above any other man I know or have heard of), all and singular my real estate, property, lands, tenements, houses, messuages, and lots of ground, wheresoever the same may be found or situate, together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining—including: [*here follows a description of the real estate.*]

"To have and to hold all my said hereinbefore devised real estate and immovable property, lands, houses, messuages, tenements and lots of ground, with their, and each and every of their hereditaments and appurtenances, unto the said "American Society for the Prevention of Cruelty to Animals," as its own proper freehold and absolute property, free from all incumbrances, to be by the said society and the said president thereof, used, occupied, enjoyed, and disposed of for the benefit of the said society in such

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manner as to the said president thereof shall seem meet and proper.

“I also give and bequeath unto the said ‘American Society for the Prevention of Cruelty to Animals,’ all and singular my movable property, goods, chattels and effects, and moneys, and sums of money, and debts, and accounts due me, and checks, bills, and promissory notes, and bank-book and bank account, and all sums of money which from any source shall in any wise hereafter become due and payable to me, and every other thing of any value which I possess now or may hereafter become possessed of, to be by the said ‘American Society for the Prevention of Cruelty to Animals,’ and the president thereof, appropriated and applied to the use and for the benefit and furtherance of the humane objects of said society. In fact, I will, order and desire, that everything I am now possessed of, or hereafter may be possessed of, and all my property, real and personal, movable and immovable, shall be the sole and absolute property of the said ‘Society for the Prevention of Cruelty to Animals,’ after my decease.

“I further will and desire that all my said real property shall be by the said ‘American Society for the Prevention of Cruelty to Animals,’ retained in its ownership and possession for its benefit, and not sold or aliened by said society, or transferred to any other person, or society, or owner whomsoever.

“And further, I will and order that all moneys or sums of money, which may be coming to the said ‘Society for the Prevention of Cruelty to Animals’ from any source by virtue of this will, shall be invested in real estate property by my executors hereinafter named, for the sole, exclusive and perpetual use, benefit and enjoyment, of the said ‘American Society for the Prevention of Cruelty to Animals.’

“Likewise, I make, constitute, and appoint Henry

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Bergh, Esq., president of said society, and Archibald H. Campbell, Esq., his associate, to be executors of this my last will and testament, hereby revoking all former wills by me made.

“In witness whereof,” &c. [*Here followed the usual clauses of attestation, with signatures.*]

According to the petition for probate filed by one of the executors, the decedent left him surviving no known heirs or next of kin.

On the return day of the citation, which was issued and published according to law, counsel appeared for the executors and sole legatee named in the will, and other counsel appeared, in opposition, for certain legatees mentioned in an instrument of prior date, which has been offered for probate, but is not directly at issue in this present controversy; and other counsel also appeared to oppose on behalf of the Consul-General of France intervening for alleged next of kin and heirs in that country.

Objections to such probate of the instrument in question, were filed by said contestants, all of whom, in substance, alleged that the same was not the last will and testament of the decedent; that it was not his free, unconstrained and voluntary act; and the objections of the counsel for the Consul-General, also alleged that the decedent “was not of sound mind, memory and understanding; but, on the contrary, that his mind was unsound, his memory impaired, and his understanding weakened by sickness and various other causes;” and, further, that “at the time of the execution of the said instrument, and for a long time prior thereto, the said Bonard was affected by, and subject to, insane delusion, which guided and controlled him in the execution of said last will and testament; and that, had it not been for the existence of such insane delusion, he would not have executed said instrument purporting to be his last will and testament, and which

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instrument wholly disregards the claims of those who should, and otherwise would, have been objects of his bounty."

It appears from the testimony that all the formalities of execution required by the statute of wills of real and personal estate were complied with, and this was not disputed by either of the counsel for contestants, on the argument.

I. The first question in the case, therefore, to be considered, is, that of testamentary capacity; and the inquiry, on the objections and testimony before me is, mainly, whether the decedent, at the time he executed the alleged will, was of that sound mind and disposing memory which the law requires to be possessed by a testator, or whether the doctrine of metempsychosis, alleged to have been believed by the decedent, constituted such insane delusion as to have so operated upon his mind that he was rendered incapable of making a testamentary disposition of his estate.

Several witnesses, called by the counsel for the alleged next of kin and heirs, testified to statements made by the decedent, wherein he expressed the belief, at different times, that the souls of men, after death, passed into animals. It was, therefore, urged that this belief was an insane delusion, and that it so affected his mind against the natural claims of relatives as to influence him to bestow all his property, real and personal, upon the "American Society for the Prevention of Cruelty to Animals," named as the sole legatee of the will in question.

There was no important amount of evidence adduced, otherwise, tending to show an insane mind. He was a man of fair education and intelligence; his habits were frugal and temperate; he gave his personal attention to his property, which, by his industry and watchfulness, had accumulated to a large amount.

This belief of what is known as metempsychosis,

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which, simply stated, is a speculation as to the destiny of the soul after death, is urged as an evidence of the insanity of the testator.

To no human being has been given the positive knowledge of an existence after death. The instincts of the human mind prompt us to believe, or at least to hope, that, although there may be a death of the body, yet that there is an intellectual or spiritual part of our nature which survives in some form or other. But, in a logical sense, there is no *major premise* of knowledge; it is, to all of us either a matter of speculation, or a belief based on the religious doctrine or tenets which we accept. To almost every man there is, to to him, some evidence that there is a higher power, whatever that power may be, which has created this world, and which governs it. The manifestations which surround him on every side, confirm him in that belief, though what that power or Being is, he can, with his finite knowledge, have no definite conception; and, therefore, his views as to a future state rest merely on philosophical speculation, or the faith of that religion which he accepts as his creed and is taught by its priests; and "faith is the evidence of things not seen." The world is divided into many sects, each sect presenting a creed more or less different as to a future state. This very doctrine, metempsychosis, as shown in this case, has been believed in by Pythagoras, Plato, and others of the ancient philosophers, and sages of the East, and even, in modern times, by intellectual, wise, and good men, and is, at this day, accepted by a larger portion of the human race, on the globe, at large, than those who reject it.

Having seriously considered this subject, with reference to the nature and limited capabilities of the human mind, and the differences not only of race, but of men of the same race, living under the same civil and religious institutions, and resulting from origin, edu-

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ration and circumstances; and also borne in mind the freedom of individual conscience, favored by the society in which we dwell, and by our laws, and the multifarious forms and shades of opinion, on all subjects, which are consequently engendered among us, and must be tolerated, whether as means of arriving at truth itself, or, as wise, or mistaken, methods of happiness, which each person has a right to select for himself, or as heresies and error in individual cases, inevitably growing out of the large liberty accorded to all; and taking, as I feel compelled, a comprehensive and liberal view of the subject,—my reflections have led me to say that I can not commit myself to what I would deem an extravagant and unjust stretch of judgment of a court of justice, to hold, upon the question of the condition or destiny of the soul of man, after the death of the body,—of which no man has more positive knowledge than can be expressed by his individual belief,—that insanity, or a delusion, to be characterized as insane, as respects competency to dispose of property by will, for a purpose, which might not, otherwise, than for an alleged delusion, have been entertained, but which purpose, in itself considered, is entirely rational and explicable on other grounds, is to be ascribed to one who honestly and sincerely had faith in the doctrine of metempsychosis, and who, having no family or any near or known remote relations, bequeathed his entire estate to or for a society for *the prevention of cruelty to animals*.

It appears to me that, if a judicial officer should assume, that merely because a man earnestly believed in that doctrine, he was insane or labored under an insane delusion, or monomania, incapacitating him for making a will, if prompted by that faith, but, though consistent with it, wholly rational in its provisions, it would not fall very far short, in principle, of assuming that all mankind who do not believe in the particular

faith which the judge accepts, respecting the future state, are more or less insane, or the victims of an insane delusion.

This question is entirely within the domain of opinion, or faith, and not of knowledge. A man may properly be assumed insane upon evidence that he is governed by hallucinations which are *physically* impossible to the knowledge of all sane men, and which are contrary to the evidence of the *senses*, or who is influenced by delusions, which are the creation of diseased reflective faculties.

Hence, the opinion as to a future state, of which no man has positive knowledge, and in regard to which mankind have always differed, and do widely differ to-day, even in the most civilized countries, and among the most intellectual of men, can not, in any respect, be deemed evidence of insanity; the only rule by which the insanity of one of certain opinions can be determined, being by some test founded on positive knowledge.

The insanity of an opinion must be established only with reference to means of knowledge accessible to men of common minds and understanding, and not upon the results of profound scientific researches or experiment, or scholastic theology, or religious tenets concerning the nature of the infinite, or the destiny of the race beyond the present, which, itself, is too vast and mysterious a domain for the finite mind to comprehend; and if we are so much at fault, or deficient, and so at variance in opinion of the truth of the present, how can we presume to hold one insane, as to our nature and destiny in the future?

Moreover, if a court is to ascribe insanity to a man, or a class of men constituting a sect, on account of his or their opinion or belief as to a future state, and a particular sect had, in fact, attained to a real knowledge of that future, the logical deduction would necessarily be,

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that a major portion of mankind, comprised in all other and different sects, were of unsound mind or monomaniacs on that subject. If it be the case that such knowledge has been so attained by a sect or known body of believers, the question remains, which it is, and what tribunal is to exercise the judgment of determination.

But what degree of practical importance has the question of the testator's belief in the peculiar doctrine referred to, in this case?

It is not proved that any act of his life in regard to his property was insane, or that the peculiar opinion entertained by him, respecting the destiny of man or the form or condition of his future existence, and claimed to be a sign of mental disease, or of an unsound mind, manifested itself in the use or disposition he made of his money or property, in his lifetime, or that the management of his affairs was characterized, in any manner, by such, or any, peculiar opinions concerning the nature of man or his future life; and, so far as the proof appears in this case, the testator's general conduct of his business affairs did not distinguish him from a multitude about him; and in his, no more than in their case, indicated unsoundness of mind.

But it is not strongly claimed that the testator was otherwise unsound in mind than that he was a monomaniac on the subject of the transmigration of souls, and that, in consequence of that, he made the will in question. There is no proof of any declarations he ever made connecting such opinions with his intended disposition of property by will. No such opinions were expressed or alluded to, nor was there any conversation on the subject, when the will was prepared or executed, nor does it appear that he alluded to any such opinions, for a long time before, though he may have entertained them. It does, however, appear, that in his last illness, and about the day the will was made, the testator re-

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ceived the Holy Sacrament at the hands of a priest of the Catholic Church, to which he had formerly belonged, and in which he was reared. It therefore seems to be an inference only, that the will was the offspring of those opinions. I can not decide such to be the fact, on the evidence. The will is silent about such opinions, and, in none of its provisions, imports that the testator held them. It just as much imports that his opinions were those of *annihilation*, or that no soul survives the body, and probably it would not be claimed that the believers in that doctrine are, on that ground alone, incompetent to make a will; and in fact, a will, such as is before me, though nothing is given to individuals, or for the direct benefit of the human race, does not *necessarily* import that the testator was not a believer in the most enlightened religion known in our midst. It would, it is true, be a singular act for one thus enlightened, so to devote a large estate, but the object is a very worthy one, and has the commendation, and commands the respect, of the best minds, and the sympathies of all humane people. The commission of cruelty to certain useful animals has long been punishable in this State as a misdemeanor, and the prevention of such cruelty, besides being right, has even its salutary moral effect upon man himself, in the sense that all forms of cruelty inflicted by him are, more or less, the expression of violent passion or of insensibility, tending to retard his own moral advancement; and now, organizations to prevent cruelty to animals exist extensively here and in Europe, and to that object, liberal contributions are made by our most charitable and thoughtful citizens from year to year, and no reflecting person will withhold his approval of expenditures of money for the purpose, as among the laudable movements of the age. How, then, can it be urged that the bequest of the testator's entire property to the society named, is either, in itself, irrational, or not reconcilable with a sound mind, or

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that it implies even a belief in the transmigration of souls of men after death, any more, necessarily, than any other forms of belief, that are, generally, in our country accepted as true? It is, then, impossible, or it would certainly be a violation of established principles of law, for me to hold this will to be wholly the offspring of the peculiar opinions of the testator respecting the souls of men in the future, when the case entirely lacks evidence of declarations by him, connecting those opinions with the testamentary act, or expressing a purpose of making such a will *because* he so believed; and I am not prepared to say that, even if such evidence had been produced, I would feel required to take a different view of the sanity of the act, when, as in this case, the testator had neither wife nor child, father or mother, or any known, near or remote, relatives living on the earth, or others on whom he was, or felt himself, under obligation, to bestow his property. He had no relatives known to him,—none had followed him in his career, or taken any interest in his welfare, comfort or happiness;—and not until after a long life, successful in the accumulation of an estate, and after the journals had promulgated, here and abroad, that quite a fortune is left, is there any claim of relationship to him; and while the French Consul-General at New York has properly intervened in these proceedings, to save the legal rights of the subjects of France, who may be heirs at law or next of kin to the testator, and, by his counsel, has diligently performed his duty to his government, and by his agents in France, endeavored to make known, there, the pendency of these proceedings, the period of over eighteen months has elapsed since testator's death, and it is not yet clear to me that a single heir-at-law or next of kin in fact, has presented himself, although months ago a commission was issued to France, at the instance of the consul-general, to take proof on the subject, but is not yet returned as exe-

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uted. So that the argument, made at the early stage of this proceeding, and since, that this will ignores the claims of relatives upon testator's bounty, and should be looked upon with disfavor or suspicion, has quite lost such degree of force as it originally had.

The result of my reflections on this branch of the case is, therefore, that the will in question is not impeached as a testamentary paper, on the ground of the mental incapacity of the testator.

The question of mental capacity having therefore been determined, as well as that of proper execution, the instrument propounded would be entitled to admission to probate as the last will and testament of decedent, as an entirety, unless there be ground for a different decision in respect of its constituting such last will, depending on my determination of the question of the validity of the devise and bequest contained in the paper; the same having been submitted to my decision under *Laws of 1870*, ch. 359, § 11, which is as follows:

“In any proceeding before the said surrogate to prove the last will and testament of any deceased person, as a will of real or personal estate, or of both real and personal estate, in case the validity of any of the dispositions contained in such will is contested, or their construction or legal effect called in question by any of the heirs or next of kin of the deceased, or any legatee or devisee named in the will, the surrogate shall have the same power and jurisdiction as is now vested in and exercised by the supreme court to pass upon and determine the true construction, validity and legal effect thereof; he shall enter in his minutes any decision he may make in relation thereto, and any of the heirs or next of kin of the deceased, or any of such legatees or devisees, may appeal therefrom in the same manner, and with the same effect, in every respect, as is now provided by law in relation to appeals from decisions

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of surrogates, admitting wills to probate or refusing the same."

II. As to the validity of the devise of the real estate of which decedent died seized.

The statutes of this State, applicable to this question, provide, that all persons, except idiots, persons of unsound mind and infants, may devise their real estate by a last will and testament, duly executed, according to the provisions of this title.

Every estate and interest in real property, descendible to heirs, may be so devised.

Such devise may be made to every person capable by law of holding real estate ; but no devise to a corporation shall be valid unless such corporation shall be expressly authorized by its charter, or by statute, to take by devise.

The sole devisee of the real estate of decedent is "The American Society for the Prevention of Cruelty to Animals," a corporation created by special act of the legislature, passed April 10, 1866. It is not disputed that the charter of said corporation, as it existed at the time of testator's decease, contained no words expressly authorizing it to take real estate by devise, and the invalidity of the devise in question is so apparent as to require no discussion whatever, were it not that the counsel for the said society offered in evidence an act of the legislature, passed March 8, 1871, which is as follows:

SEC. 1. "The American Society for the Prevention of Cruelty to Animals, a corporation created by an act of the legislature of this State, passed April 10, 1866, is hereby authorized and empowered to take, hold, use and enjoin all the lands, tenements and hereditaments which were, by the last will of Louis Bonard, devised unto the said corporation, for the uses and purposes in said will expressed. And all the estate, claim, right, title and interest of the people of this State, of, in, and

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to, said lands, tenements and hereditaments, and every part thereof, are hereby released, granted, confirmed to and vested in said corporation.

SEC. 2. "The sixth section of an act entitled "An act to incorporate the American Society for the Prevention of Cruelty to Animals," passed April 10, 1866, is hereby amended and shall read as follows :

SEC. 6. "This corporation shall be capable of taking, holding and enjoying any real property by virtue of any deed, or of any devise contained in the last will of any person whomsoever, subject to the provisions of law relating to devises by last will. But this corporation shall not in its corporate capacity hold real estate, the yearly income derived from which shall exceed the sum of fifty thousand dollars.

SEC. 3. "Nothing in this act contained shall in any manner affect the right of any heir or creditor of the late Louis Bonard.

SEC. 4. "This act shall take effect immediately."

The counsel for the society, in his argument, admitted the invalidity of the devise, and that the society did not claim such real estate under the will, but by virtue of the act last referred to ; and submitted to the court that it was proper for it to pass upon the effect of that enabling statute, in determining what disposition is to be made of the real estate here.

I do not deem it any part of my province to entertain the question of the effect of that special act.

If the lands, so in terms devised, escheated to the State, on account of the invalidity of the devise, and the non-existence of heirs capable of inheriting the real estate of testator, the escheat was effectual at the instant of testator's decease, and no enabling act could be rendered lawfully retroactive, to invest the society with power to take any real estate by previous devise, the invalidity of which, at the time, either rendered the real estate inheritable at the instant of death by the

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heirs at law, or escheated to the State for want of such heirs.

The only question which it is proper for me to decide as to such real estate is, not, who are now vested with the title, or may enforce the rights of any party now lawfully claiming the same, whether it be the society by such enabling act, or any individuals, otherwise claiming; but simply whether the devise was valid, and if not valid, it would follow as a consequence that the testator died intestate as to such real estate. To entertain jurisdiction of what disposition is to be made of the same real estate, as claimed under that act, would be equivalent to trying the title to the real estate as between the society, not as devisees, but as subsequent grantees of the State, and others who may, or might, claim as heirs at law.

I must, therefore, hold that the direct devise of the real estate to the society is invalid, and wholly inoperative by law.

III. As to the validity and effect of the bequest of the personal property, which is as follows: [The learned surrogate here quoted the third paragraph of clause *fourth* of the will, which will be found on p. 180 above.]

It is claimed by counsel for two legatees under an alleged former will of testator, dated February 11, 1871, (and which is now on file in this court, and propounded for probate, but not yet otherwise acted upon): That under its provisions there is an equitable conversion, at his decease, of the personal property of the testator into real estate for all the purposes of the instrument, and that he assumed to devise the entire property to an incorporated society, therein named:

That such incorporated society was not, at the time of the death of said Louis Bonard, or at any time prior thereto, authorized by law to take by devise:

That the disposition of the property in favor of said

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society was for uses and upon trusts, which were unauthorized by law, and in contravention of the statutes in such case made and provided :

That each disposition in said instrument which the testator assumed to make of his property of each kind and description was in contravention of the statutes prohibiting the suspension of the power of alienation of real estate, and of the absolute ownership of personal property, for periods not measured by lives in being, or by such lives and subsequent minorities :

That the revocation clause is invalid and inoperative, having been manifestly introduced only for the purpose of substituting, for his antecedent testamentary dispositions, which were mainly in favor of the same donee, the still more liberal provisions of this instrument, and, this object failing, by reason of the entire invalidity of the last intended disposition, the revocation clause falls with the devise to which it was subservient, and to effectuate which it was introduced :

And counsel for the consul-general of France, intervening for alleged foreign next of kin, claimed :

That the bequest, or so-called bequest, of personal property, is also null and void, and of no effect for the same reasons ; said bequest being in fact and in law, by the terms of said instrument, a devise of real estate by reason of the directions in said instrument contained, to convert the said personalty into real estate :

That the several provisions in said pretended will, directing that the said property so pretended to be devised should be held for the uses and upon the trusts therein mentioned, and for undetermined and unlimited periods, are, and each of them is, void, as being contrary to the laws and statutes of the State of New York :

If the bequest above set forth stood alone, without any subsequent clauses referring to the personal property, there could be no doubt of its validity as an abso-

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lute gift: and this view, I believe, is not controverted by either of the contesting parties.

The uncertainty of its validity, however, arises from a subsequent clause, but not immediately following it; (one intervening), and all that follows such bequest in the will is in these words: [The learned surrogate here quoted the residue of the will beginning with the fourth paragraph of clause *fourth* which will be found on p. 181, above.]

I therefore now proceed to consider the meaning and legal effect of the clause for the investment of money in *real estate property*.

In the first place I am satisfied that the clause under which the doctrine of equitable conversion into real estate is claimed, is not limited to the moneys or sums of money left by the testator, but extends to, and embraces all moneys, whatsoever, which may, under the will, arise from any portion of the personal property of the testator; as the language is plain and explicit as referring to moneys arising *from any source* by virtue of the will. These emphatic words leave no doubt of the testator's intention in respect to the character or meaning of the terms, "money or sums of money."

The next, and, indeed, primary question concerning the effect of the clause for the investment of moneys in real estate property, is, whether, under it, there was an equitable conversion, at testator's decease, of the said personal property into real estate; the argument being, that, if there was such a conversion into real estate, the society, being incapable by law of taking real estate by devise, therefore the bequest under which it is claimed the direction so to convert or invest, was given, is void and inoperative.

It is my judgment that there was not such an equitable conversion.

In the case of *Wright v. Trustees Meth. E. Ch.* (*Hoffman*, 202), it is said: "If the purposes for which a

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sale of real estate is directed by will are illegal, there is no conversion." "The real and personal property were blended into one fund by a direction that the former should be sold and the latter collected, and the whole applied to the payment of the debts and legacies, and the residue was given by the will to certain corporations: *Held*, that there was no conversion of the realty (as regards the surplus), the corporations being incapable of taking the land."

So, applying the principle of that case to this will, it would certainly seem to follow that if the society in question, was incapable of taking land, in which the personalty was directed to be invested, then, as to the legatee, there was not an equitable conversion,—and the direction so to invest is inoperative and void; and that the society, for whose use and benefit the investment was ordered to be made, would take the personalty *as such*, under the direct bequest of the same, by another clause of the will, in the same manner as if the inoperative subsequent direction had not been inserted; whether the same be regarded as creating an implied trust which can not lawfully be fulfilled, or as only a direction void in law, even if not invalid for repugnancy.

The legal estate of the personal property was not, by the will, in terms, vested in the executors, who were ordered so to invest it in real estate property. It was a naked direction, unless it can be maintained that the testator intended to invest them with the title to the personalty, or created an express trust of such personalty in the executors, or an implied trust, for the uses and purposes mentioned.

Aside from the fact that the clause in question, did not immediately follow the previous absolute bequest to the society, it is noticeable, and not immaterial, that the intervening clause related solely, to the real estate specifically devised and particularly before described;

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and the clause relating to the investment of moneys in real estate property is one which commences with the words "I will and order" that all moneys or sums of money which may be so coming *to the said society*, from any source, &c., shall be invested, &c., thus referring to the absolute ownership before given; and I am now asked, so to construe the directions there given as to investment, that if the same can not be lawfully made in *real estate property*, for the sole, exclusive and perpetual use, benefit and enjoyment of the said society, that the preceding bequest, absolute in its terms, shall fall with such unlawful directions for investment.

Where a direction to invest the proceeds of land, in land, fails from illegality, they are still regarded as land, and pass to the heir and not to the residuary estate (*Thorn v. Coles*, 3 *Edwards Ch.*, 330): and, on principle, it is the same as to personal property directed to be invested in land; if the direction so to invest in land fails from illegality; it is still regarded as personalty, passing to the next of kin, if not otherwise disposed of or bequeathed under other clauses of the will; and this qualification applies, equally, to the doctrine of the case last cited.

I am unable to discover that the clause for such investment has that great importance; or that any good reason can be assigned, that could have induced the testator to render the gift, first expressed as absolute, actually dependent upon the subsequent clause; for that would be directly in conflict with the general scope and theory of the will, and would, contrary to his intention, render him intestate as to the personalty, in case the last clause failed; neither can I perceive any good reason to suppose that he should, any the more, have intended to create a perpetual trust in real estate under the clause directing such investments in real

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estate, than that he so intended, as to the lands which he specifically devised directly to the society.

If the personal property had been directly bequeathed to the executors, *in trust*, for the purpose of investment as aforesaid, and there had been no direct bequest to the society, I should not hesitate to pronounce the directions of such investment unlawful, and consequently that such bequest, in trust, would fall with it; as the doctrine of equitable conversion would then apply to it, and the validity of the trust would depend upon the capacity of the society to take real estate by devise; because the law would not permit them to take indirectly, what they could not take directly; and even if they could take by devise, the devise would be subject to the question of absolute restriction against alienation by the society, if the preceding clause, referring to the specific real estate devised, applied to the subject of such equitable conversion, which seems to have been claimed on the argument; but, it must be noticed that the restriction contained in the will against alienation of real estate, in its terms, refers only to "said real property," meaning, evidently, the lands before particularly described.

Or, if the testator had employed any words in the clause directing such investment, to show, plainly, his intention that the preceding bequest was conditional upon the directions so given, there might be stronger reason for interpreting the directions as creating a trust; but the clause is without words necessarily importing a trust, or is not so clear, as implying one to be created or intended, that any forced construction should be given to it, which should, or might, defeat and subvert the absolute character of the general bequest of the society. There is certainly no trust created by express words, and none is clearly implied, and if neither is the case, the directions for investment in real estate property should be observed and performed, if

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they can lawfully be ; but if not, the main purpose and intentions of the testator as to the disposition of his personal property, before absolutely given to the society, should stand, and courts should seek to effectuate the testator's intentions, as they may be ascertained from the whole instrument, and not to defeat them. The intentions of a testator are, of course, to be ascertained from an examination of the entire paper, as he executes it ; without reference to the validity or invalidity of any of its provisions, for he is not supposed, or presumed, to doubt that effect may be given to all it contains. It is for the courts to determine whether to all, or to what part ; but, so far as the construction of any part depends on testator's intention, it is to be ascertained, and can only be, by a view of the whole instrument ; for that purpose, assuming validity of all its provisions. In this case, it is, in the first place, obvious that the testator intended that none of his relatives near or remote, should share in his estate, real or personal, for no mention is made of any of them, or any provision direct or contingent for their benefit. Next, it is plain that the society referred to should be the only beneficiary of his estate, real and personal. No mention is made of any other, to take directly or indirectly, absolutely or contingently. His primary motive, and the pervading purpose of the instrument, throughout, was that the society named should have, use, and enjoy, for its corporate purposes, whatsoever property of any kind or description he should leave at his death. He so expressed himself in unequivocal words in the devise of the real estate, and the bequest of the personalty. He created no trust of the specific realty described, in his executors, for the benefit of the society ; he did not withhold from them the legal title to it, giving them only the equitable use ; but he, in express terms, intrusted and devised it directly to them ; and the only peculiar feature of that devise, if, indeed, there is that to be said

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of it, in a legal sense, was, that the society should not alienate the real estate so specifically given to it; but this, if expressive of more than a desire, wish, or recommendation that the real estate should not be alienated, only confirms the singleness of his purpose, that the society should, for its corporate objects, be the sole recipient and possessor of his real estate, and if such was the unreserved or direct control which he intended to confer on the society, by the direct devise of the real estate of which he died seized, there is no *presumption* to be entertained that he intended any the less to give the society the direct title to his personal estate and control over the same, and, therefore, no intention to fetter, or expose to defeat, the absolute character of the general bequest, except so far, if at all, as he, in express and unequivocal terms, by the subsequent clause, provided that the title to, or possession of, the personalty should be intercepted or withheld from the society by means of an express trust, or terms of prohibition or restriction against such actual possession of the personal estate; and if the construction claimed by contestants, of the clause for the investment of the personalty into real estate property is sound in law, it is difficult to harmonize it with the absolute bequest before made, if such construction is that a trust in the executors was created for the perpetual benefit of the society; for if so, there is the incongruity or contradiction of an unqualified gift entitling the legatee to the ownership and possession of the personalty, and a subsequent clause creating a trust which, in effect, declares that the society shall have neither title nor possession, but only the use of its income: no such contradiction or inconsistency of intention of a testator, can be presumed or entertained of a rational person, unless on the supposition that his mind was changed as he proceeded in the declaration of his will.

My conclusions on this portion of the case are: that

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the direct bequest of the personal estate to the society is valid as an absolute gift ; that the subsequent clause under which the doubt has arisen, does not create a trust in perpetuity as real estate, by conversion ; that such last clause amounted only to a direction which was to be executed if it could lawfully be, so as to vest the personalty converted into real estate, in the society ; that the prospect that the investment could lawfully be so made, does not seem to be the only or principal consideration that induced the testator to make the bequest ; that as the testator had not vested the real estate before specifically devised, in the executors, as trustees, for the benefit of the society, but devised it directly to the society, he, probably no less intended that the real estate in which he directed the personalty to be invested, should be taken by the executors in the name of the society, and not in their names as trustees, and therefore, as well as for other reasons above stated, the clause in question relating to investments does not defeat, but is, or may be fulfilled, in furtherance, and in execution, of the general scheme of the will, apparent from all other parts of it ; that as the society could not thus take the bequest in the converted form of real estate, the clause became inoperative, and left the general bequest to take effect as an unconditional and independent gift ; and that if an implied trust was created by the particular clause relating to investments in real estate, it was repugnant to the previous absolute gift, and therefore void ; or, if not so repugnant, but, as an implied trust, could not be lawfully executed, the implied trust falls, and still leaves the previous clause of bequest operative, as necessary to carry out the obvious general intention of the testator.

IV. As to the legal effect of the revocation clause in the will in question.

It was urged by the counsel for the two legatees Walter Jones and William H. Bell, named in the other

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instrument, purporting to be a will of earlier date, that the revocation clause in the paper now under discussion, was introduced by testator, only for the purpose of substituting for his antecedent testamentary dispositions in favor of said society, the more liberal provisions of the last, that is to say, of the whole real and personal estate; and that such object failing, by reason of the entire invalidity of the last instrument, the revocation clause falls with the devise and bequest to which it was subservient, and to effectuate which it was incorporated.

The point so taken by the counsel for the two legatees named in the prior instrument, was maintained on the argument, on account of its importance, in case, and assuming that, it should be determined that the bequest of the personal estate of the testator, as well as the devise, in the will of later date, was void, so that no property of either description would pass under it, and thus (excepting the appointment of executors), leave only the revocation clause standing for consideration. The question would, in that event, be quite a difficult one to decide; but it is apparent that, from my determination of the validity of the bequest, it is unnecessary to investigate the authorities cited by the learned counsel for those legatees: as a later will bequeathing the testator's entire personalty, absolutely, and in a form free and clear of all legacies to third persons, is, by the law of this State, *ipso facto*, a revocation of all former wills of or affecting the same personal estate; and, consequently, by my decision of the bequest to the society as valid, the legacies in the previous instrument, given to Messrs. Jones and Bell, which could, thereunder, be enforced only against the personalty, are in legal effect annulled, wholly irrespective of the existence or legal effect of an express revocation clause, which, in this case, and with my view of the last bequest, only made express, what was, without it, a legal consequence.

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Before concluding my opinion, it is proper to present some well established cardinal principles, and decisions in particular cases, which have aided and guided me in my determination, and may be usefully cited as applicable to the questions arising on the bequest before discussed.

Courts should rather strain to prevent the divesting of an estate, though not to give an estate that never vested.

An implied intent, or a doubtful implication of different intent, that can not be lawfully effectuated, should give way to and be controlled by, clauses which are express and clear.

In *Schettler v. Smith* (41 N. Y. 329), DANIELS, J., said: "The will, the construction and effect of which are in controversy, was clearly intended to make a full and final disposition of all the estate, real and personal. Its general tenor and meaning, as well as the particular provisions, devises and bequests made of the property, very clearly show that to have been the design and intent of the testator. And this circumstance must be prominently observed and considered in determining the effect of particular terms and phrases, which standing by themselves, may not be entirely consistent with the execution for that purpose (3 *Burrows*, 1626).

"And it was stated in terms of similar import by the chancellor, in deciding the case of *Bond v. Bergh*, (10 *Paige*, 140, 152). He there declares that the intent of the testator, so far as it is consistent with the rules of law, must govern in the construction of a will. When, therefore, the intention is apparent upon the whole will, taken together, the court must give such a construction as to support the intent of the testator, even against strict grammatical rules. The observance of this principle is important in this case [*Schettler*], in view of the circumstances already referred to, that the will renders it entirely clear that the testator did not

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intend to die intestate as to any portion of his estate, and that intention should be maintained by the construction given to the different clauses in the will, if that can practicably be done, consistently with the language he has made use of in framing them."

In general, implication is admissible only in the absence of, and not to control, an express disposition (*Rule 11, Jarman on Wills; Dyer, 330 b.; 8 Rep. 94; 2 Vern., 60; 1 P. Wms., 54*).

Words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected (*Jarman; also 18 Ves., 466; 4 C. B. N. S., 791*), and that other can be ascertained, and they are in all cases to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative (*3 Ves., 450; 7 Id., 458; 7 East, 272; 2 B. & A., 441*); and of the two modes of construction, that is to be preferred which will prevent a total intestacy (*Cas. t. Talb., 161; 4 Ves., 406; 2 Mer., 386*).

In *Parks v. Parks* (*9 Paige, 107*), it is stated that the intention of a testator, as to the disposition of his property, by will, is not to be defeated where such intention can be ascertained upon a careful examination of the whole will, and that intention is not inconsistent with the rules of law.

Where a testator's intention can not operate to its full extent, it shall take effect as far as possible (*Rule 13, Jarman; Finch, 139; 4 Ves., 325; 13 Id., 486*).

It is a well settled principle of law, that where a will contains distinct and independent provisions devising different portions of the testator's property, or distinct estates or interests in the same portions of the property, some of which provisions are consistent and others inconsistent with the rules of law, the former will be permitted to stand, although the latter are declared to be

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illegal and void, except where they are so dependent on each other that they can not be separated.

A testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary (*Rule 24, Jarman*). It was said in *Jenkins v. Hughes* (8 *H. L. Cas.*, 571.; 6 *Jur. N. S.* 1043), that whether a general intent or a particular intent expressed in a will is to prevail, must depend on the context of the whole will, in construing which the words of a technical kind are not necessarily to receive a technical meaning.

Full effect should be given to the particular intent, as well as to the general intent of the testator, so far as his particular intent can be ascertained by the will, and as is consistent with the rules of law, and with his general intent; which general intent must control in a will (*Parks v. Parks*, 9 *Paige*, 107).

It is necessary to give full effect to special intentions of a testator, so far as they can be ascertained by the will and are consistent with the rules of law, as well as to his general intention as to the disposition of his property after his death. The rule of construction in such cases is to give effect to the whole of the language of the testator in expressing his particular intent, *provided* it is not inconsistent with the general construction of the will (1 *Roberts on Wills* [3 *Lond. Ed.*], 356; *Dawes v. Swan*, 4 *Mass.* 208).

There is no rule of more universal application, both here and in England, that the plain and unambiguous words of the will must prevail, and are not to be controlled or qualified by any conjectural or doubtful constructions growing out of the situation, circumstances or condition, either of the testator, his property, or his family (*Bunner v. Storm*, 1 *Sandf. Ch.*, 357; *Mann v. Mann*, 14 *Johns.*, 1; *Parsons v. Winslow*, 6 *Mass.*, 175; *Dawes v. Swan*, 4 *Mass.*, 208).

There is, perhaps, no rule of construction of more

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universal application to wills, or which oftener requires to be acted upon, than that every portion of the instrument must be made to have its just operation, unless there arises some invincible repugnance, or else some portion is absolutely unintelligible (*Norris v. Beyea*, 13 *N. Y.*, 273, 283).

In *Chrystie v. Phyle* (19 *N. Y.*, 344), *STRONG, J.*, states the leading doctrines applicable to the construction of wills in a very clear and forcible manner; as that the language used shall receive its ordinary interpretation, except where some other is necessarily or clearly indicated; and where words are equivocal, that meaning shall be adopted which will tend to preserve consistency, in preference to one which will create inconsistency, and, if possible, some effect shall be given to each distinct provision of the will, rather than it should be annihilated (1 *Redfield on Wills*, 432; *Hone v. Van Schaick*, 3 *N. Y.*, 538; 3 *Barb. Ch.*, 488; 3 *Brad. Surr.*, 230; 16 *Barb.*, 412; 13 *N. Y.*, 98).

In 35 *N. Y.*, 162, the court affirms the rule, that it is proper to incline towards such a view as will render the instrument legal and operative, rather than the opposite.

If the words of the will be such that they may be construed in two different senses, one of which would render the disposition made of the property illegal and void, and the other would render it valid, the court should give that construction to the language that will make the disposition of the property effectual (*Butler v. Butler*, 3 *Barb. Ch.*, 310; *Mason v. Jones*, 2 *Barb.*, 230).

A clearly expressed intention in one portion of the will, is not to yield to a doubtful construction in any other portion of the instrument (*Corrigan v. Kiernan*, 1 *Brad. Surr.* 208; *Brown v. Lyon*, 6 *N. Y.*, 419).

When the testator's general or primary intention appears, the court, in order to give it effect, would sacri-

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fice to it a particular or secondary intention inconsistent with it (*Lovett v. Kingsland*, 44 *Barb.*, 567, and cases cited).

In *Kane v. Astor* (5 *Sandf.*, 467), it was held, that in construing a will, the court must give full effect to every part of it, if lawful, and to single words as well as to sentences and paragraphs. But it is a permanent principle that the court shall carry out the general intent of the testator; and where a particular word or sentence is repugnant to the general intent and design of the whole will, or tends to render it incongruous or insensible, such word or sentence must give way, rather than sacrifice the whole scheme of disposition disclosed by the general tenor of the instrument.

It is true, as a general rule, that where a gift or trust is void by statute, as a disposition in favor of persons or objects prohibited from taking, or in a manner forbidden, as in violation of statute, or where the gift contravenes some policy of the law, as tending to a perpetuity, a trust to the extent of the estate given, will result to the donor or his heirs, or legal representatives, *but only so, if it is not otherwise disposed of*.

In *Webb v. Wools*, (2 *Sim. N. S.*, 267), KINDERSLEY, V. C., said, "Where the later words of a sentence in a will go to cut down an absolute gift, contained in the first part of a sentence and are inconsistent with such gift, the court will, if it can, give effect to the absolute gift."

If two parts or provisions of a will are repugnant, so that both can not stand, the last will prevail, *unless other parts* of the will forbid it (*Bradstreet v. Clark*, 12 *Wend.*, 602; *Covenhoven v. Shuler*, 2 *Paige*, 122; *Mason v. Jones*, 2 *Barb.*, 229; *Parks v. Parks*, 9 *Paige*, 107; *Leggett v. Perkins*, 2 *Comstock*, 207, 306).

A subsequent clause, apparently irreconcilable with precedent provisions, will be construed in connection with them, and may be rejected, if repugnant to the

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*intention of the testator as derived from the whole will (Bradley v. Amidon, 10 Paige, 235).

It sometimes happens in wills that there are clauses inconsistent with each other, in which case both can not take effect. In such a case it becomes the duty of the court to select one or the other. In analogy to the fact that the last will of a testator is to prevail in preference to the earlier one, the courts have adopted from necessity a similar rule, and treated the subsequent words in the will as indicating a subsequent intention; *unless, indeed, there be other expressions in the will which make it apparent that the first should take effect* (Sims v. Doughty, 5 Vesey, Jr., 247; Constantine v. Constantine, 6 Id., 102; Parks v. Parks, 9 Paige, 124; Dawes v. Swan, 4 Mass., 215; Sweet v. Chase, 2 Comstock, 73, per RUGGLES, J.).

A bequest to a man, generally, of money or personal property is an absolute legacy, and in such a case a subsequent *direction* to the executors to put the money at interest for the support of the legatee does not in any manner revoke or qualify the gift. It merely relates to the investment, and being inconsistent with the absolute title before given to the legatee, it is null and void. No valid qualification can be attached to a full title to personal property (Dorland v. Dorland, 2 Barb., 65).

In Beck v. McGill, 9 Barb., 35, the devise was to a married woman for life, "subject to the powers and limitations therein expressed," followed by an appointment of her husband as trustee "to take possession of the property so devised, receive the rents and apply the same to her use during her life, as she should direct;" and by a codicil, other property was devised to her for life, "subject to the same restrictions, limitations and powers in trust specified in my will." *Held*, that the power being inconsistent with the devise was void, and that the devisee took an unshackled estate for life.

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When an absolute interest is given to the legatee, a devise over is void for repugnancy (11 *Wend.*, 275).

No precise form of words is necessary to create a condition in wills. But whenever the intention of the testator is *clearly* manifested that the legacy should depend on a condition, and the *condition is not repugnant* to the estate or *contrary* to the *rules* of law, the intention will be carried into effect (*Shep. Touch.*, 433; *Pink v. Thuissey*, 2 *Mad.*, 157).

If a legacy is given upon the performance of a condition subsequent, which is illegal, the rule at common law, and by the civil law adopted in courts of equity, is the same, and the condition is void and the legacy is *absolute*, *freed* from the *condition* and is as if *no condition* had been annexed to it. It is upon this principle that conditions and *qualifications inconsistent with and repugnant to* the gift, are wholly void and are to be rejected. This rule is well illustrated by a case decided by Lord ALVANLEY, Master of the Rolls. Lord A. said: "I find it laid down as a rule, long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the *condition* is wholly void. A condition that tenant in fee shall not aliene is repugnant, and there are many other cases of the same sort. In all these cases the gift stands, and the condition or exception is rejected" (*Bradley v. Peixot*, 3 *Vesey*, 324; *Schermerhorn v. Negus*, 1 *Denio*, 448).

If a good bequest is made to a legatee, subject to an illegal or void direction to accumulate, as where such direction is *independently* engrafted upon the bequest, and can be stricken out without destroying the substantial form of the gift, the gift may be held to be good, but the direction to accumulate void (*Haxton v. Corse*, 2 *Barb. Ch.*, 503; *Craig v. Craig*, 3 *Id.*, 76; *Martin v. Mangham*, 14 *Sim.*, 230; *Williams v. Williams*, 4 *Selden*, 525; *Phelps v. Pond*, 23 *N. Y.*, 69; *Kilpatrick*

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v. Johnson, 15 *Id.*, 322; *Hanley v. James*, 5 *Paige*, 318; *Philadelphia v. Girard*, 45 *Pa St.*, 1).

In *Darling v. Rogers* (22 *Wend.*, 483), it was settled by the court of errors that where real estate is awarded upon two or more trusts, some of which are legal and the others are void or unauthorized by law, the title passes to the trustee, so far as is necessary for the purposes of the authorized trusts, notwithstanding the provision of the revised statutes, which declares that where an express trust shall be created for any purpose not authorized by those statutes, no estate shall vest in the trustee.

Executors take possession of the personalty of the testator, as trustees in law for the legatees thereof, if any are named in the will; and if the direction in question under this testator's will, as to investment of personalty in real estate, constitutes a trust express or implied, and is void, it still leaves the personalty in their hands, as trustees, for the lawful purpose of delivery, at the proper time, to the society, as legatee thereof under the general bequest of the will.

These views comprise all that need be said on the various points submitted by counsel upon the questions of the validity of the devise and bequest arising in the case, and a decree will be entered accordingly, as well as for the admission to probate of the paper so propounded as the last will of deceased, bearing date February 14, 1871, and adjudging that the instrument of earlier date, offered for probate, was revoked and annulled by the will so admitted.

Decree accordingly.*

* No appeal was taken.

Tolan v. Conover.

TOLAN *against* CONOVER.

Supreme Court ; Second Department ; Second District, General Term, 187

DECEIT.—ACCOUNT STATED.—MISTAKE.

Where C., who bought a stock of goods from T., took the inventory with the prices attached for the purpose of adding the columns of figures, and ascertaining the sum total, and returned the inventory after several days with the footings made, stating that if there were any errors therein they were trifling in amount, and a settlement was thereupon made on the basis of those footings, which proved to be erroneous. *Held*, that a finding by the jury, of deceit, should not be set aside.

Simpson Tolan brought an action in this court against Frant Conover and another, based on the following state of facts.

The plaintiff sold a stock of goods and fixtures to the defendants. An inventory was made, with prices attached. In footing a number of long columns of figures, there was an error of one thousand and twenty dollars against the plaintiff, and in favor of the defendants, by one of whom (Conover) the footing was made. The defendants say that the inventory was taken, and the purchase made, limiting the price at the sum of the footing "both parties chancing errors." The plaintiff says this referred to small errors only ; the defendants say it covers all errors. The chief dispute between them is, whether the footing was intentionally erroneous, and, therefore, a fraud on the part of the defendants.

The price agreed to be paid for the stock of goods was eighty per cent. of the inventory. The plaintiff prevailed at the trial, and had a verdict for eighty per cent. of the one thousand and twenty dollars.

Tolan v. Conover.

Britton, Ely & Snell, for defendants appellants.

S. D. Morris, for plaintiff respondent.

BY THE COURT.*—TAPPEN, J. [After stating the facts].—There is no doubt an action could have been maintained on the contract. The questions are, whether the action could have been maintained on the ground of deceit, and whether the proof justifies a verdict for the plaintiff on that ground.

It was shown that the defendant Conover himself, proposed making the additions or footings, and he had the book at home for several nights for that purpose; and on closing the purchase, Conover said that if there were any errors, they were trifling in amount. The inventory with the figures made by the defendants, went to the jury as a part of the proof to enable them to decide whether the error was intentional or accidental.

The court charged the jury that if the defendants intended to cheat and defraud the plaintiff by presenting figures knowing them to be false, and if the evidence satisfied the jury of that, they should find for the plaintiff, otherwise for the defendants. The defendant sought a nonsuit, and afterward a new trial, on the ground that the testimony did not sustain the charge of deceit, and the case comes up on exceptions to the refusal of the court in these respects.

We are not at liberty, on the whole case, to say that the jury erred, or that the evidence is not sufficient to sustain the verdict. Courts are cautious of reversal on this ground, even although they might have decided the other way on the facts (*Wendell v. Safford*, 12 *N. H.*, 171; *Clark v. Whitaker*, 19 *Conn.*, 319).

Nor does the case show passion, prejudice, or inattention to their duty on the part of the jury (*Cothran*

* Present, J. F. BARNARD, P. J., and TALCOTT and TAPPEN, JJ.

O'Brien v. Merchants' Ins. Co.

v. Collins, 29 *How. Pr.*, 155; Graham v. Waterman, 1 *New Trials*, 525, 2nd ed).

The judgment and order must be affirmed, with costs.

O'BRIEN against MERCHANTS' INSURANCE COMPANY.

New York Superior Court; Special Term, October, 1874.

DISCONTINUANCE.—ATTACHMENT.

The provision of section 232 of the Code of Procedure, limiting the right of the sheriff to discontinue proceedings under warrants of attachment, except "at such times and upon such terms as the court or judge may direct," is for the protection of the parties interested in the subject attached, that there shall be no discontinuance by the sheriff to inure to their injury.

Where those interested to the extent of the surplus to arise after payment of the judgment and costs from the attached property would be injured by the sheriff's discontinuance of the proceedings, the court will require him to prosecute to judgment, and then after payment thereof, and of all costs under subd. 4, of section 237, of the Code of Procedure, to deliver over the residue to those so interested, upon demand.

James O'Brien, sheriff of the city and county of New York, brought four actions in this court against The Merchants' Insurance Company, The Commercial Fire Insurance Company, The Williamsburgh City Fire Insurance Company, and The Mechanics' & Traders' Insurance Company, respectively, to collect the amounts of four policies of insurance, of two thou-

sand five hundred dollars each, by virtue of seven warrants of attachments, amounting to about seven thousand dollars, against one E. S. Candler, Jr., the party insured. The defendants, on the eve of trial, offered to pay to the sheriff the amount of the attachment and taxable costs to date, and demanded that on such payment the actions should be discontinued by the sheriff.

Brown, Hall & Vanderpoel, attorneys of record, for the sheriff, moved to discontinue, on said terms, under section 232 of the Code.

William W. Badger, as attorney in charge of the actions on behalf of the attaching creditors, he holding also a power of attorney from said E. S. Candler, Jr., the party insured, and claiming to protect his interest and margin in the surplus in the policies, over and above the amount called for by the attachments, opposed.

George W. Parsons, as counsel for the defendants, united in the motion of the sheriff to discontinue.

CURTIS, J.—It appears, from the papers, that the granting leave to the sheriff to discontinue these suits commenced by him on behalf of sundry attaching creditors of one Candler, to collect claims in Candler's favor, on policies of insurance, would prejudice Candler's interest in any surplus that might be due to him after the claims and costs of the attaching creditors were paid in full.

The effect of such a discontinuance, it is claimed, and seemingly with reason, would be to defeat Candler's recovery, from the insurers, of such surplus, by reason of the limitations as to the time in which he can sue.

The provisions of the Code (§ 232), limiting

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the right of the sheriff to discontinue this class of actions, except "at such times, and upon such terms, as the court or judge may direct," is evidently designed for the protection of the parties interested in the debts attached; and that there shall be no discontinuance, on the part of the sheriff, of actions that will inure to the injury of such parties.

I think it is the duty of the sheriff to prosecute these suits to judgment; and when, as provided in subdivision 4 of section 237 of the Code, "the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof."

The motion is denied, without costs.

MATTER OF HERBECK.

*Surrogate's Court, County of Westchester; before
HON. OWEN T. COFFIN, Surrogate, October, 1874.*

GUARDIAN AND WARD.

The husband of a female infant, though himself an adult, does not, since the Married Women's Act of 1848, acquire control of her property by marriage.

The surrogate's court has therefore authority to appoint a guardian of the estate of a married female infant.

It seems, that an existing guardianship of a female infant is not, since the Married Women's Acts, terminated as to her *property* by marriage.

In May, 1871, Frances M. W. Dunworth, being then an infant over fourteen years of age, applied to this

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court for the appointment of her father, Wilfred Dunworth, as her general guardian, and he was accordingly duly appointed guardian of her person and estate.

Recently, the guardian, for causes assigned, has been relieved of his trust. It now appears that the ward, a female of about eighteen years of age, was married some time since to one Herbeck, and that her husband, who is an adult, is still living, and that she is entitled to personal property amounting to about seven thousand dollars. The wife now applies to have her husband appointed guardian of her estate.

David McClure, for the petitioner.

COFFIN, Surr.—By the statute (3 *Rev. Stat.*, 244, § 7, 5th Ed.), surrogates have the same power as the supreme court (formerly chancery) to appoint general guardians for minors (2 *Kent Com.*, 224). That court had power to appoint one person guardian of the estate, and another of the person (*Dayton, Surr.*, 675, and cases cited).

It seems to me to follow that if the late guardian had not been relieved from his trust, but had by some rule of law been divested of control either over the person or over the estate of the ward, he would have retained his power over the other. Hence, if the marriage of the ward does not, *ipso facto*, render a guardian of either her person or estate unnecessary, this court has power to appoint one. What, therefore, is the effect of her marriage, and what marital rights has her husband as to her person and property? Chancellor KENT (2 *Com.* 226), after reviewing various English decisions, concludes thus: "It would be quite reasonable that the marriage of a female ward should determine the guardianship, both as to her person and her estate. It ought to be so as to her person, but not as to her estate, if she married a minor. Upon the

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marriage of a *male* ward, the guardianship continues as to his estate, though it has been thought otherwise as to his person." This doctrine is adhered to in *Matter of Brick's Estate* (15 *Abb. Pr.*, 12). The opinion delivered by Judge DALY, acting as surrogate in that case, is remarkable for the research of the learned judge into the origin, history, and jurisdiction of surrogate's courts. Before, however, entering upon that field of inquiry, he disposes of a question identical in principle with that presented here, and reaches a conclusion in which I am unable to concur. The person in that case who petitioned for the opening of an accounting had by the executor, and for a further accounting by him, was a married female minor. It was objected that her testamentary guardian, and not herself, was the proper person to make the application, and that it could not be made by her, and she insisted that the guardianship was terminated by the marriage. The court, however, after briefly referring to the authorities which are cited by KENT, and to some others, determining that the guardianship of both the person and estate of the ward ceased, and became vested in the husband as such, or, at least, that he has a right to reduce her property to his possession, *—overruled the objection.

At common law the husband undoubtedly had a right to reduce his wife's choses in action to his possession, and thus convert them to his own use (2 *Kent Com.*, 135); and a legacy, or a distributive share of the wife, is to be regarded as a chose in action (2 *Kent Com.*, 117, 4th Ed., *Notes*). So if the wife, whether a minor or an adult, should die, the husband, at common law, and also formerly by statute, had the right to administer upon her estate, and to reduce to his possession, and enjoy exclusively, his wife's personal property. Thus, the

* In *Brick's Estate*, the court held that as the marriage of a female ward terminated the guardianship, she was entitled to petition in person.

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marriage relation clothed him with rights to her person and property, which the law recognized and protected. By our recent statutes, however, the wife is secured in the possession and enjoyment of her separate estate, and, if she be an infant, her rights should be jealously guarded until she shall reach an age which would entitle her to the possession and disposal thereof. The act of 1848 provides that "the real and personal property of *any female* who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, *as if she were a single female.*" Surely this statute was not intended for adult married women only, when it has ever been, and is still, the policy of the law to guard with just and great solicitude the rights of infants. Suppose this married minor were "a single female," the property would still, of course, belong to her, but it could only be controlled and managed by a guardian, or be invested by the surrogate for her benefit (3 *Rev. Stat.*, 177, §§ 52, 53, 5th Ed. ; *Id.* § 87, 185).

I can but think, with great deference, that the distinguished counsel engaged in the Matter of Brick's Estate (decided in 1862), failed to call the attention of the learned judge who delivered the opinion in that case, to the statute of 1848. It was there held, as already mentioned, that the married female minor might properly petition without the intervention of a guardian, and it seems to me a legitimate sequence that she may personally receive her share of the estate, and give it to her husband, or squander it, or otherwise dispose of it as inclination or caprice may dictate; and again, if the common law on this subject still prevails, notwithstanding the act of 1848, then does it not follow as a necessary corollary, that the husband may recover and

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take to his own use her legacy or distributive share, and other *choses in action*, and thus defeat the very design of that act?

Thus all the safeguards the law and the courts have erected so carefully to protect the estates of infants, would be at once beaten down. If this doctrine shall hold good as to a married female minor of twenty years, it will equally apply to one just turned fourteen. The law has wisely fixed the period when the ward and her property shall be emancipated from wardship, at the age of twenty-one. Then, and not until then, can she make valid contracts as to her property, or manage or control it in any manner, except by a testamentary disposition made at and after attaining the age of sixteen.

On the whole, I think the only way to enable this minor to avail herself of the full benefit of the act sometimes called "The Married Women's Act," is, for this court to so place her property as to render it secure until she shall have attained her majority; and her application is accordingly granted.

People *ex rel.* New York, &c. R. R. Co. *v.* Havemeyer.

PEOPLE *ex rel.* NEW YORK & HARLEM RAIL-
ROAD COMPANY *v.* HAVEMEYER.

*Supreme Court, First Department, First District ;
Special Term, 1874.*

MANDAMUS.—NEW YORK.

Where it appears that work authorized by law to be done at the expense of a municipal corporation, who are to collect such expense from the tax payers, has been done, and all the requirements of the statute have been complied with; the money to be paid on the part of the city, has been collected and paid into the city treasury; the city auditor has certified to the justice of the claimant's demand therefor; and the comptroller has drawn his warrant in the claimant's favor,—a peremptory mandamus will issue to compel the mayor to countersign the warrant.

The justice of devolving the costs upon the individual officer, instead of on the municipality, is a reason for allowing a mandamus, even though it be suggested that an action would lie.

This was an application for a peremptory mandamus to compel the respondent, William F. Havemeyer, as mayor of the city of New York, to countersign a warrant drawn by the comptroller of the city.

Chapter 702 of the *Laws of 1872* (2 *Laws of 1872*, 1674), which provides for improving and regulating the use of Fourth-avenue, in the city of New York, and creates a Board of Engineers to take charge of and manage the work therefor, in the seventh section, enacts that one-half the cost of such work shall be borne by the New York & Harlem Railroad Company, and one-half by the city of New York, and “when and as often as it shall appear, by the certificate of the superintending

People *ex rel.* New York, &c. R. R. Co. v. Havemeyer.

engineer of the work upon said improvement, that the sum of twenty-five thousand dollars has been expended thereon by the New York & Harlem Railroad, specifying the portions and divisions of the said improvement, when the said expenditure has been made, the comptroller of the city of New York shall draw his warrant upon the treasury of the said city, in favor of the treasurer of the said railroad company, for one-half of said sum, which shall be duly signed and countersigned by the proper officers of said city, and delivered to the railroad company for and on account of the one-half of the expense and cost of said improvement, to be borne and paid by the said city as aforesaid."

Section eight provides that the one-half of the estimated cost of the improvement which is to be borne by the city, shall be raised by taxation upon the real and personal property, and one-half thereof shall be included in the tax levy of 1872, and the other half in the tax levy of 1873. The comptroller of the city is directed to issue revenue bonds to meet the amount to be paid by the city, and the section thus concludes: "It is hereby intended and declared that the payments of the city of New York are to be made in the proportion and as fast as they are made by the said railroad company during the progress of the work on the said improvement."

After the passage of this act, the relators proceeded, under the direction of the said board of engineers (which board has pursued each and every step required by the law to be taken), to make the improvement.

The city of New York raised by tax, including it in its tax levy of 1872, one-quarter of the whole estimated cost of the improvement, and there was collected and paid into the treasury of the city the sum of one million five hundred and eighty-seven thousand dollars and fifty cents, to meet its share of the cost of the work.

By the act of April, 1873, payments by the corpo-

People *ex rel.* New York, &c. R. R. Co. *v.* Havemeyer.

ration of the city of New York must be made through the proper disbursing officer of the department of finance, on vouchers to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller, and countersigned by the mayor. Connected with the finance department is an audit bureau, which, under the supervision of the comptroller, is required to audit, revise, and settle all accounts in which the city is concerned as debtor or creditor, the chief officer of which is called the auditor of accounts.

On May 14, 1874, a certificate, in conformity with the provisions of the act under which the improvement is making, was made out by the superintending engineer, and delivered to the comptroller of the city of New York, certifying that two hundred and seventy-six thousand four hundred and sixty-six dollars and ninety cents had been expended upon the improvement, specifying the portions and divisions of the same where the expenditure was made.

The auditor of the bureau of accounts, having duly examined the certificate, certified a claim for one-half thereof to the comptroller, which latter officer drew a warrant for one-half the amount of the certificate of the superintending engineer, to wit, for one hundred and thirty-eight thousand two hundred and thirty-three dollars and thirty-five cents, and duly signed the warrant, which warrant was also countersigned by the mayor.

After the mayor (William F. Havemeyer) had countersigned the warrant, he caused his name to be taken therefrom, and now refuses to countersign the same, though he has been requested so to do.

The money wherewith to pay the said warrant was then and now is in the treasury of the city.

No disputed question of fact arises upon this application. No question of fraud or collusion is urged.

People *ex rel.* New York, &c. R. R. Co. v. Havemeyer.

Henry H. Anderson and Chauncey M. Depew, for the relator.

Simon Sterne, for the respondent.

WESTBROOK, J. [after stating the facts].—The objection that a mandamus was not the proper remedy, was argued preliminarily, and disposed of prior to hearing the argument upon the merits. It may not be improper, however, as this case is one of great public interest, to state briefly the reasons which influenced that decision. Assuming the validity of the act of 1872, the doing the work, the honest expenditure of the money, and all the facts set out in the moving papers (all of which must be assumed in disposing of this preliminary objection), a plain duty was imposed upon the respondent by the statutes of the State, one which was imperative and mandatory, the non-discharge of which worked gross wrong and injustice to the relator. No other remedy was adequate and proper to meet the case. The taxpayers and all the officers of the corporation, other than the respondent, had faithfully and completely discharged their various duties. The money had been collected and paid into the city treasury—the auditor, under the direction of the comptroller, had certified to the justice of the claim—the comptroller had drawn his warrant for the amount, and the only obstacle to its payment was the want of a counter-signature of the mayor, who (all this must be conceded in asking a refusal of the writ on this ground) without reason and without cause, declines to affix his name to a warrant which the law declares he shall do. What other remedy will meet this case? Granting, for the sake of argument, that an action could be maintained against the corporation for labor performed and moneys expended under the act (which, as the law specially provides for the ascertainment of the claim, the mode of

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raising the money, and its payment, I do not believe), what propriety is there in subjecting the municipality of the city of New York (as well as the relator) to the costs and expenses of an action at law to enforce a claim which every tax-payer and officer thereof, except the mayor, desires to have paid, and has done all in his power to have discharged? Within every principle which has ever been held upon the writ of mandamus, it must be the proper remedy. No other will reach the evil, and devolve the costs of the proceedings where they belong, if the points urged upon the merits do not justify the Mayor in refusing to perform the official act.

The reasons which influenced us in holding that a mandamus is the appropriate remedy in this proceeding, are fully sustained in *The People v. The Supervisors of Columbia County* (10 *Wendell*, 363), and *The People v. Mead* (24 *N. Y.*, 114; see pages 120, 121, 122, 123). In the latter case, Judge DENIO, in commenting upon some decisions which have been strenuously urged to this court, says: "But I do not think these cases fully in point against the plaintiff. None of them present the case of a proceeding prescribed by statute for raising money by a local tax for the benefit of a class of creditors, where that proceeding has been carried on, according to law, nearly to its completion, where it has proved effectual in raising the money from the tax-payers, who were the proper parties charged with its payment, and where the only step wanting to produce satisfaction to the creditor is the payment of the money, so raised, into his hands. If the defendants are allowed to persist in refusing to make payment, on the ground that the relator has a right of action against the town, the anomaly would be presented of the legal pursuit by a creditor of money owing by the town, which it had already raised and collected from the tax-payers, and placed in the hands of a public officer for the purpose of being paid to its creditors—all in per-

People *ex rel.* New York, &c. R. R. Co. *v.* Havemeyer.

formance of specific statutory directions—but where in consequence of the perversity of the official person, whose duty it was made to pay it over, it could not be obtained by the creditor.” This is the exact course of argument which influenced us in overruling the motion to dismiss the proceedings upon the ground that the remedy asked for—a mandamus—was not the appropriate one, and with a single further citation from the same opinion of Judge DENIO, in which he comments upon the other case we have cited (*The People v. The Supervisors of Columbia County*), we close the discussion of this preliminary objection: “If the opinion should be thought to go too far in denying the liability of the county to an action, still the case is an authority for holding that when a particular method of raising money for local public purposes is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred, which may be enforced by the writ of mandamus.”

But it is further objected (and this objection goes to the merits of the application), that the certificate given by the superintending engineer, and for one half of which the comptroller of the city drew his warrant, includes items not expressly chargeable, under the act of 1872, to the cost of the improvement. If this objection be well taken, the amount of the illegal charges embraced in the certificate, is of no consequence, and hence the application for a reference to ascertain the exact amount of such improper charges was refused. The certificate could only include such items as the law aforesaid authorized, and if it was made up in part of sums unauthorized, the application for the writ would be refused if such amount was great or small.

[His Honor then proceeded to consider at length the application on its merits.]

The result of my examination is, that the peremptory mandamus asked for should issue.

Davis v. Stover.

DAVIS *against* STOVER.*New York Superior Court; Special Term, April, 1874.*TRUSTEE—RECEIVER—CONTRACT—PRINCIPAL AND
AGENT.

As a general rule, an agent employed by a trustee, in the execution of the trust, must look to the one employing him, personally, for compensation, and an executory contract, therefore, does not bind the estate.

Where a person indebted to an estate was employed by the receiver thereof to assist him in the duties of his trust, and to render services on behalf of the estate, and such services were rendered upon the faith of an express agreement by the referee that their value should be applied to the payment of the demand in favor of the estate against the employee, and it was conceded that the services were necessary for the estate,—*held*, that the reasonable value of the services constituted an equitable set-off in an action brought against the employee on the debt due from him to the estate.

Henry D. Stover, appointed receiver of The Ocean National Bank, by the comptroller of the currency, under the act of congress of June 3rd, 1864, establishing the national banks, and the acts amendatory thereof, received, as part of the assets of the bank, several promissory notes made by M. P. Wood, and indorsed by H. D. Stover, against both of whom this action was brought, on the notes, for the sum of nine hundred and ninety-two dollars and one cent.

The defendant Stover set up in his separate answer, as an equitable defense, that the plaintiff, as receiver, had procured the defendant to assist him in the custody and care of, and to render his services as an expert, with those of an assistant employed at defendant's own expense, in arranging, appraising, and supervising the

*Reversed
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sale of, a stock of printing materials, plates, types, presses, and machinery, of the value of more than one hundred thousand dollars, in the possession of the plaintiff as receiver,—upon the express agreement that the services of the defendant and his assistant in that behalf, should be in discharge of the claim which the receiver had against the defendant on the notes, and that the value of the services should be applied to the payment thereof. The defendant further alleged that such services were rendered upon the faith of that agreement; that they were of great pecuniary value to the estate and to the receiver, and enabled the receiver to realize his claim upon the property, being about the sum of one hundred and ten thousand dollars in full; that the services were necessary for the preparation for sale of said property, as the receiver was wholly ignorant of such matters, and that without such preparation and like services no sale of the property could have been effected. The defendant also claimed that the reasonable value of the services was the sum of three thousand dollars, but if it should be adjudged that they were of less value, then the same was interposed as an equitable off-set *pro tanto*.

The plaintiff demurred to this defense, for insufficiency, as constituting no defense to the action.

Sunderland D. Smith, for the plaintiff, to the effect that the receiver had no power to bind the estate by any agreement, cited: *Kennedy v. Gibson*, 8 *Wall.*, 428, 500; *Matter of Van Allen*, 37 *Barb.*, 225; *Bowman v. Tallman*, 2 *Robt.*, 385; affirmed, see 41 *N. Y.*, 619; *Ferrin v. Myrick*, 41 *N. Y.*, 315; *Mygatt v. Wilcox*, 45 *N. Y.*, 306; *Austin v. Munro*, 47 *N. Y.*, 360; *Bloodgood v. Sears*, 64 *Barb.* 71; 2 *Williams on Executors*, 1510 [marg. p.]; Act of Congress of June 3rd, 1864, entitled “An act to provide a national cur-

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rency," &c., § 50, 13 *U. S. Stat. at L.*, 99; *Davis v. Stover*,* in the New York Common Pleas, General Term, March, 1874.

Addison Brown, for the defendant, to the effect that the receiver, as a "statutory assignee," had power to employ necessary aid, and to pay out of the funds of the estate, or pledge the funds so far as necessary therefor, or to allow necessary services as a payment of a claim, so as to constitute an equitable set-off, cited: *Kennedy v. Gibson*, 8 *Wall*, 498, 506; *Verplanck v. Mercantile Ins. Co.*, 2 *Paige*, 438, 452; *Corey v. Long*, 12 *Abb. Pr. N. S.*, 427; *Mann v. Witbeck*, 17 *Barb.*, 388, 391; *Howes v. Davis*, 4 *Abb. Pr.*, 71; *Noyes v. Blakeman*, 6 *N. Y.*, 567, 580, *S. C.*, below, 3 *Sandf.*, 531; *Chouteau v. Suydam*, 21 *N. Y.*, 179, 183; *Columbian Ins. Co. v. Stevens*, 37 *N. Y.* 539; *Burrill on Assignments*, 205, 442.

FREEDMAN, J.—Although, as a general rule, an agent employed by a trustee, receiver, executor, or administrator, in the execution of the trust, must look to the person employing him, individually, for his payment, and an executory contract of this character does not bind the estate, yet the reasonable value of services actually rendered by such an agent, upon the faith of an express agreement that the compensation is to be made out of the estate, may, the necessity for their rendition being conceded, constitute an equitable set off to any claim or demand which the estate may have against such agent.

* In this case, similar services were set up as a counter-claim only, without any averment of their necessity, or any special agreement by the receiver. The referee before whom the action was tried, ruled out the evidence of the counter-claim, and on appeal to the general term, the decision was affirmed.

McArdle v. Barney.

McARDLE *against* BARNEY.

*Supreme Court; Third Department, Third District,
Special Term, April, 1874.*

RECEIVER.—JURISDICTION.

Where an action was brought in the supreme court, for the appointment of a receiver of the assets of a corporation, by a stockholder, in behalf of himself and all others in interest who might become parties, and subsequently another action, in the same form and for substantially the same purpose, was begun in a different department by another stockholder, and a decision therein had without the knowledge of the plaintiff in the first action,—*Held*, that the court in the district in which the first action was pending were not concluded by such decision, especially where the circumstances were such as to give rise to a suspicion of collusion between the parties to the second action.*

If, however, the plaintiff in the first action had been heard in the second, and the court had pronounced judgment therein, with a full knowledge of all the facts, well recognized principles of law and comity would forbid interference with it by the court in the other district.

The plaintiff was the owner, on November 1, 1866, of one hundred shares of stock in the joint stock company known by the name of Wells, Fargo & Company. The par value of the stock on that day was one hundred dollars per share, and its actual value in market was two hundred and eighty-five dollars per share. The business of the company was expressage and carrying in California, Oregon and the Western Territories, and also banking, &c. On the said day, November 1, 1866, the then trustees of the Wells, Fargo & Co. company, who are defendants in this action, by a unanimous vote of the trustees, dissolved the corporation. This they were empowered to do by the articles

* Compare *Kerr v. Blodgett*, 16 *Abb. Pr.*, 137; and a further decision in 48 *N. Y.*, 62.

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of association, unless two-thirds of the stockholders objected, such dissolution making the trustees holders of the assets of the late corporation for the benefit of its stockholders.

Immediately upon its dissolution, (such dissolution was effected to enable them so to do) the said trustees, the plaintiff objecting, transferred to a rival company, then known by the name of the Holladay Overland Mail and Express Company, and now known, and a party to this action, by the name of Wells, Fargo & Co., the name, good will and territorial rights and other personal property of the said dissolved association, and received in payment therefor four millions of dollars in stock (at its par value), of the defendant, Wells, Fargo & Co. The entire stock of the dissolved corporation, on the day of such dissolution, consisted of twenty thousand shares of the par value, and actual value hereinbefore stated. Besides the property transferred to Wells, Fargo & Co. (formerly Holladay Overland Mail and Express Company), the trustees of the dissolved corporation (Wells, Fargo & Co.) held certain other property of considerable value for the benefit of its former shareholders.

This action was commenced on February 16, 1870, in this court, against Ashbel H. Barney, Nathan H. Stockwell, Henry Wells, Edwin B. Morgan, Johnson Livingston, trustees of the old association of Wells, Fargo & Company, for the benefit of the plaintiff, and all other parties who were interested and might become parties to the action, for the purpose of obtaining relief on account of the alleged illegal sale to a rival corporation, and to obtain a receiver of the assets of the dissolved company, who should distribute the same to the stockholders.

In May, 1871, the cause was referred, and on March 29, 1873, the referee reported:

1. That the action of the trustees in dissolving the

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joint stock association of Wells, Fargo & Co., on November 1, 1866, was a legal exercise of their powers, and in all respects valid.

2. That it was the duty of the trustees of the assets of the said company to proceed on such dissolution with due diligence, and convert the assets of the company into money, and distribute the same among the stockholders, and to the plaintiff at the rate of 100-2000 thereof.

3. That the said trustees, by reason of having sold a portion of said assets to the defendants, Wells, Fargo & Co., at private sale, without having given any notice thereof, and having taken stock in payment therefor, violated their duties as such trustees, and are liable to the plaintiff for the value thereof.

4. That the value of the assets of said joint stock association was two hundred and eighty-five dollars per share; and that plaintiff's one hundred shares thereof and therein were worth twenty-eight thousand five hundred dollars.

5. That the portion of the assets of the said company so sold and transferred to the defendants, the now Wells, Fargo & Co., were worth two hundred dollars on each share of the old company so dissolved.

6. That the plaintiff is entitled to judgment against the defendants for twenty thousand dollars, with interest thereon from November 1, 1866, with costs; and that a receiver of the assets of said old association of Wells, Fargo & Co., so dissolved for the benefit of the stockholders of said association, and all others interested, be appointed with the usual power and duties of a receiver in like cases.

A motion was made at a previous special term to appoint a receiver, in conformity with this report. That motion was resisted by the defendants, on the ground that in a suit begun in this court, in the city of New York, by one Ann E. Wilson, in behalf of the

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association of Wells, Fargo, & Company, against Danford N. Barney, and others, trustees of the dividend fund of the Wells, Fargo, & Company Joint Stock Association, such proceedings were had, that by the judgment of this court, in the first judicial district, Ashbel H. Barney, one of the defendants in this action, had been appointed receiver for the purpose of distributing the assets of the late association among its former shareholders. The court then ordered a reference to determine who was a proper person to be receiver, and whether said Barney should be removed, and another receiver appointed. The referee reports that said Barney should be removed, and Abraham V. Dewitt appointed.

N. C. Moak and W. Frothingham, for the plaintiff.

Samuel Hand, for the defendants.

WESTBROOK, J. [after stating the facts at length].—The hearing before the referee was on notice to the receiver, and the evidence taken is returned for our guidance. From such evidence there taken, it appears that the Wilson case was commenced subsequent to this one. The plaintiff therein was one of the stockholders of the original company who gave consent to the sale of the property to the new, but claimed by the complaint that the trustees of the old association had been guilty of fraudulent and illegal conduct since the sale, and that a receiver should be appointed to distribute its assets. That cause being at issue, it was referred, by consent, to Albert Stickney, to hear and decide. The report of the referee in that action bears date February 5th, 1873, and judgment was entered thereon on February 7th, 1873, after this cause, which was older in its beginning, had been submitted to the referee for a decision, but before such decision was announced.

By the judgment of the Wilson case, the whole

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conduct of the defendants is approved, the trustees absolved from liability to any stockholder, large allowances made to Mr. Barney for services, and he (Barney) appointed receiver. To this suit Mr. McArdle was not made a party, nor was he cognizant in any way of the proceeding. The existence of this prior action was not communicated to the court which rendered the judgment in the Wilson case, and, what is more singular still, the plaintiff in that action, and her husband, who acted as her agent in regard to it, had no knowledge or notice of the reference, or of the judgment which had been obtained therein.

One of the attorneys of that plaintiff (Mrs. Wilson) was also examined, but threw very little light upon the transaction, he claiming that his partner, who was in Europe, had conducted it.

As already stated, of the existence of that suit of Mrs. Wilson, the plaintiff (McArdle) had no knowledge. If, on his being heard, and with a full knowledge of the facts, a competent court had pronounced the judgment, and made the appointment of Mr. Barney, well understood principles of law as well as judicial comity, would forbid any interference in this manner. The appointment in the Wilson case is, on its face, formal and regular, still the circumstances attending it are so suspicious, that I strongly think it was collusive and friendly, to avoid the judgment in this case.

Undoubtedly the learned and respected judge who granted the decree, acted rightly upon the light given to him, but I do not see how the same court, though held by another judge with a full and more perfect knowledge of all the circumstances, and after a full hearing of all the parties, is guilty of any disrespect to him if it sees fit to appoint a new receiver. That proceeding was *ex parte* so far as this plaintiff is concerned, and as this suit was the older in point of time,

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and was proceeding in regular form to judgment when the other decree was rendered, no volunteered seeking to interfere with proceedings in another district can possibly be imputed. Indeed, I am well satisfied that if the attention of Judge DAVIS had been drawn to this prior suit then pending, actually submitted, and awaiting decision, that decree, without notice to this plaintiff, would not have been made.

No possible disrespect, then, or breach of judicial comity can be presumed, if this court fairly examines and considers the propriety of Mr. Barney's being the receiver. It is true, the plaintiff has a personal judgment for part of the value of his stock in the old company, but he has also an interest in the remaining property to a considerable amount. With this controversy existing between him and these defendants (of whom this receiver is one), he is entitled to a receiver who shall, at least, be indifferent between the parties. It is neither fair nor just to the plaintiff that he, who is to collect and distribute the assets of the dissolved association, should be the very person whose feelings are embittered against him by a suit, and whose interests are directly antagonistic. Besides, the accounts, actions, and conduct of this very Mr. Barney, as trustee, are to be examined and passed upon, and they should be so examined and passed upon by an indifferent person, who can have access to every paper, voucher, and document which will shed light thereon. It may be necessary to institute suits against Mr. Barney for illegal or improper conduct, and surely he (Barney) ought not to be plaintiff therein. It is no answer to this argument to say that if Mr. Barney fails to fulfill his trust honestly, an action will lie against him and his surety.

No party should be subjected needlessly to litigation, and without a thorough insight into the business and transactions of the old association which a posses-

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sion of its books, documents, and papers will give, it would be impossible to conduct a suit to a successful issue. Full possession of all the property of the late company will certainly enable Mr. Barney, if so disposed, to work wrong to the plaintiff, of the existence of which he will be wholly ignorant. Laying out of view, however, all suspicions of collusion in the Wilson suit and judgment, can this appointment be proper? We need not impute any dishonest motives to Mr. Barney. It is only necessary to assume that he is human, with the feelings of our nature, and so assuming, it is but reasonable to suppose that he will prefer his own interests to those of another. Our statutes disqualifying certain persons from acting as judges, jurors, and in other capacities, proceed upon this ground. His judgment, if he continues in office, will often be taxed to consider what should be done, and whether this thing or that thing will be best for him. His judgment and conscience should not be biased by self-interest, nor tempted to wrong by feeling or passion. Mr. Dewitt, the person recommended, is, on the other hand, every way qualified, indifferent between the parties, and will certainly do justice to all, having no motive to serve one party more than the other.

My conclusion is, that Mr. Barney should be removed, and Mr. Dewitt appointed, as recommended by the referee.

Arthur v. Griswold.

ARTHUR *against* GRISWOLD.

*Supreme Court; Second Department, Second District,
General Term, December, 1874.*

ABATEMENT AND REVIVAL.—PARTIES.—SEVERANCE
OF ACTIONS.—TORT.—CORPORATION.

It seems, that where, pending an action of tort against partners, one partner dies, the action should be severed, in order to proceed both against the survivors and the representatives of the deceased.

But if the representatives procure themselves to be substituted, the order of substitution cannot be vacated on their application, after they have obtained a judgment in their favor, on appeal, directing a new trial.

William Arthur brought this action in this court against John A. Griswold, and others, as trustees of The Iron Mountains Company, of Lake Champlain, for alleged fraud in inducing plaintiff to make loans, amounting to the sum of forty-five thousand dollars, to said company, as well as on their liability as such trustees, for filing a false report, &c.

After a trial and judgment in favor of the plaintiff, the defendant, John A. Griswold, died, pending an appeal, and his executrix, Elizabeth H. Griswold, and executors, Chester Griswold and John W. Griswold, obtained an order, substituting them as defendants; the appeal was further prosecuted by them, and judgment had in their favor, directing a new trial.

Thereafter, the executrix and executors, on motion, obtained an order at special term, vacating the order which substituted them as defendants in the action, and from this order the plaintiff appeals.

C. A. Hand, for the plaintiff, appellant,—Cited

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Greenfield v. Mass. Life Ins. Co., 47 *N. Y.*, 430, 435; Fisher v. Hepburn, 48 *Id.*, 41; Merchants' Bank v. Bliss, 35 *Id.*, 412; Chaffee v. United States, 18 *Wall.*, 516; Creed v. Hartmann, 29 *N. Y.*, 591; Boynton v. Hatch, 47 *Id.*, 225; *Brom. on Parties*, 248 (56 *Law Lib.* 171); Hardyman v. Whitaker, 2 *East*, 573, note; 2 *Rev. Stat.*, 448, § 1; Yertore v. Wiswall, 16 *How. Pr.*, 8; Doedt v. Wiswall, 15 *Id.*, 128; *Code of Pro.*, § 121; Livermore v. Bainbridge, 49 *N. Y.*, 125; Gardner v. Walker, 22 *How. Pr.*, 405; McVean v. Scott, 46 *Barb.*, 379; 1 *Wait Pr.*, 154; Lochier v. Paterson, 1 *Car. & K.*, 271, and note thereto; Wilson v. Tucker, 3 *Stark. N. P.*, 154; Powell v. Reese, 7 *Ad. & E.*, 426; Chapman v. Foster, 15 *How. Pr.*, 241; *Code of Pro.*, § 349; St. John v. Croel, 10 *How. Pr.* 253.

William C. Holbrook, for the defendants respondent,—I. The object of reviving the cause, was to enable the representatives of Mr. Griswold to prosecute the appeal taken by him in his lifetime. Had he departed this life *prior* to the verdict, the action, as to him, would doubtless have abated. But the verdict having been rendered in his lifetime, and the action *being for alleged wrongs*, an abatement was saved by force of section 121 of the Code.

The plaintiff having wholly failed to revive, it devolved upon the executrix and executors, in order to save the estate of their testator from being mulcted for the whole judgment, to apply for an order of revivor, so that the appeal might be regularly carried on in their names. An application was made for an order of revivor, pursuant to the direction of the presiding judge at the general term, where a suggestion of the death of Mr. Griswold had been made, and the order December 19, 1872, thereupon entered. It was absolutely necessary that the representatives of Mr. Griswold should revive the cause as they did, for the

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purposes, at least, of the appeal to the court of appeals. Except for the intimation of the presiding justice above adverted to, a mere suggestion upon the record would, doubtless, have been sufficient at the general term, as that court had become *possessed* of the cause before the death of Mr. Griswold. But in order to carry the case beyond that court, and to insure due regularity, it became necessary to enter a formal order of revivor in the court below.

The counsel cited,—*Rogers v. Paterson*, 4 *Paige*, 409; *Anderson v. White*, 10 *Id.*, 579; *Anderson v. Anderson*, 20 *Wend.*, 585; *Miller v. Gunn*, 7 *How. Pr.*, 159; *Beach v. Gregory*, 2 *Abb. Pr.*, 203; *Hastings v. McKinley*, 8 *How. Pr.*, 175; *Schuchardt v. Remiers*, 28 *Id.*, 514.

II. The judgment appealed from having been reversed, and the verdict wiped out, the cause stands as if no trial had ever been had (*Cow. & H.*, Notes, part 2, p. 9; *Woodcock v. Bennet*, 1 *Cow.*, 735; *Close v. Stuart*, 4 *Wend.*, 98; *Wood v. Jackson*, 8 *Id.*, 36; *Hunt v. Hoboken L. & I. Co.* 1 *Hill.*, 161). Had Mr. Griswold died before verdict, the action could not have been revived as to his representatives as a joint action, for the reason that no judgment had been obtained (*Chapman v. Foster*, 15 *How. Pr.*, 241). Plaintiff elected to make the original defendants responsible if at all, on a joint liability, and so if Mr. Griswold had died before verdict, the action would have determined as to him (*Bradley v. Burwell*, 3 *Den.*, 61; *Lane v. Doty*, 4 *Barb.*, 534; *Buckman v. Brett*, 22 *How. Pr.*, 233). The executrix and executors are entitled to the same rights that they would have had if their testator had died before verdict (*Chitty on Pl.*, 50, 53, 66; *Grant v. Shurter*, 1 *Wend.*, 148). At common law the action would survive against the surviving defendants only (*Chitty on Pl.*, 67, 68; *Gardner v. Walker*, 22 *How. Pr.*, 405; *Voorhis v. Childs*, 17 *N. Y.*, 354).

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III. The executors did not waive the objection to joinder, since their duty compelled them to take the course they did take (*Avery v. Slack*, 17 *Wend.*, 87; *Bennett v. Ingersoll*, 24 *Id.*, 114; *Broadhead v. McConnell*, 3 *Barb.*, 189, 190; *Matter of De Vaucene*, 31 *How. Pr.*, 336, note; *Wood v. Phillips*, 11 *Abb. Pr. N. S.*, 1). As plaintiff has not been misled by the course the executors have taken, they are not estopped (*Jewett v. Miller*, 10 *N. Y.*, 406; *Clute v. Jones*, 28 *Id.*, 284).

The order of revivor was only for the purposes of the appeal.

At all events, plaintiff must amend his complaint in order to give evidence against the executors, in which case the defendants would be entitled to raise the question of joinder.

BY THE COURT.*—TAPPEN, J.—[After stating the facts.]—The action did not abate as to Griswold, and sounding in tort, it survives against his representatives (2 *Rev. Stat.*, 448; *Haight v. Hayt*, 19 *N. Y.*, 464).

Inasmuch as the surviving defendants, who are principals, may not be joined in an action of this nature with the representatives of the deceased Griswold, the proper practice seems to be, to move for a severance of the action (*The Union Bank v. Mott*, 27 *N. Y.*, 633).

At all events, these representatives having voluntarily come into the action, and having obtained judgment in their favor, directing a new trial, the court will not now, on their application, vacate the order of substitution, which they obtained.

The order of special term, vacating the order of substitution, should be reversed, with ten dollars costs.

Carroll v. Carroll.

CARROLL *against* CARROLL.

*Supreme Court; Second Department, Second District,
General Term, December, 1874.*

SURROGATE'S DECREE. — PROBATE. — WILL. — EVIDENCE. — DEATH. — ADMEASUREMENT OF DOWER.

The decree of the surrogate admitting a will of real property to probate with the proofs and proceedings thereon, are competent and sufficient evidence of the death of the testator, in an action for admeasurement of dower, the parties to which were all parties to the proceeding before the surrogate.*

Margaret Carroll brought this action in May, 1873, in this court, for admeasurement of dower, claimed by her as the widow of John Carroll.

Elizabeth Carroll, a defendant, claimed that she was John Carroll's wife at the time of his death, and that several infants, also defendants, were their children. To the said Elizabeth and her children, John Carroll

* This decision recognizes and establishes a principle already sanctioned by the general opinion of the profession, and by familiar practice, that the surrogate's decree of probate of a will of realty is an adjudication, not a mere record of the alleged will. In the contemplation of the original revised statutes, the probate of a will of personalty was, and still is, an adjudication, conclusive on all the world (*Vanderpoel v. Van Valkenburgh*, 6 *N. Y.*, 190; *Kellum's Will*, 50 *Id.*, 298); but as to real property, the effect of the record of probate, as evidence, was merely to furnish a substitute for the original will, much as the acknowledgment and proof and recording of a deed furnish a convenient perpetuation of evidence, without, however, having anything of the effect of an adjudication (*Jackson v. Rumsey*, 3 *Johns. Cas.*, 233; 2 *Rev. Stat.*, 58, §§ 15, 18; Reviser's note in 3 *Id.*, 2nd ed. 629). *Thorn v. Sheil* (15 *Abb. Pr. N. S.*, 81), also recognizes the effect of the probate as an adjudication on the title to realty, and this is now the commonly received American doctrine (See 3 *Redf. on Wills*, 63).

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had devised his real estate, by a will proved before the surrogate of Kings county, February 13th, 1873.

Evidence of the probate of this will was the only evidence of John Carroll's death adduced in this action.

Issues of fact were applied for by the plaintiff, and settled. The jury found that the plaintiff was married to John Carroll in England ; that they had issue born of such marriage ; that John Carroll is dead ; that he was seized in his lifetime, and during the coverture of the plaintiff as his wife, of the real estate described in the complaint ; and that the value of the several parcels thereof was seventy-five thousand dollars.

Mr. Justice BARNARD found that judgment should be given for the plaintiff, and that a sale should be had. A reference was ordered to ascertain the rights of other parties in the property in question.

The defendants excepted to the finding of the court, and to the report of the referee, and now appeal from the judgment for the plaintiff founded thereon.

Philip S. Crooke, for the defendants, appellants.—The death of John Carroll was to be proved by the plaintiff. John Carroll having been proved to be alive October 22, 1872, the presumption of law is, that he remained alive in May, 1872 (*O'Gara v. Eisenlohr*, 38 *N. Y.*, 296). No evidence was given of his death, except hearsay, which is not allowable (*Fosgate v. Herkimer, &c.*, 12 *Barb.*, 352). The probate proceedings were not evidence of the death, they merely establishing the due execution of the paper, and not requiring proof of the death of the testator, as on application for letters of administration must be furnished of the intestate's (2 *Rev. Stat.*, 74, § 26 ; *Farley v. McConnell*, 52 *N. Y.*, 630 ; *Belden v. Meeker*, 47 *Id.*, 307). The surrogate's decree does not adjudge John Carroll dead, nor purport to do so (2 *Phill. on Ev.*, 93 ; 2 *Greenl.*

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on Ev., §§ 278a, 355; 1 *Id.*, § 550, note; *Moons v. De Bernales*, 1 *Russ.*, 301; *Thompson v. Donaldson*, 3 *Esp.*, 63; *Doe v. Calvert*, 2 *Campb.*, 389.)

Morris & Pearsall, for the plaintiffs, respondent,—Cited *Monro v. Merchant*, 26 *Barb.*, 384; 2 *Greenl. on Ev.*, § 339; *French v. French*, 1 *Dick.*, 268; *Succession of Hamblin*, 3 *Robinson* (La.), 130; *Newman v. Jenkins*, 10 *Pick.*, 515; *Belden v. Meeker*, 2 *Lans.*, 470; *Russell v. Schuyler*, 22 *Wend.*, 280.

BY THE COURT.*—TAPPEN, J.—The plaintiff brought this action for an admeasurement of dower, which she claimed as widow of John Carroll. The only point discussed on the appeal, is the sufficiency of proof of the death of John Carroll.

On previous proceedings before the surrogate of Kings, the will of John Carroll had been admitted to probate. The plaintiff, at the trial of this action, offered the proof and proceedings in the surrogate's court, to establish Carroll's death.

The parties to this action were all before the surrogate in that matter.

We hold, that the death of Carroll was thereby presumptively established (*Greenl. on Ev.*, vol. 2, p. 325; *Belden v. Meeker*, 2 *Lans.*, 470; affirmed in 47 *N. Y.*, 307; the same rule is laid down in 26 *Barb.*, 384, *Munro v. Merchant*). Although the exception in that case is, that the will and letters were receivable as ancient records establishing death.

All the parties to this action have acted throughout on the presumption of John Carroll's death, and the defendants in possession hold as his devisees; in their interest the will was proven before the surrogate, and no reason existed why the presumption of death thus

* Present, BARNARD, P. J., TAPPEN and TALCOTT, JJ.
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raised in their behalf, should not be held conclusive in the absence of any counter proof.

The defendants are all in possession as devisees under John Carroll's will; the adult defendants have answered admitting his death; the infant defendants have put in the usual answer by guardian *ad litem*. If the court should hold John Carroll living, the devisees have no estate, but John Carroll dead, they become seized under his will. The proof of death is quite sufficient to uphold the judgment, which should be affirmed.

PHILLIPS *against* WHEELER.

*Supreme Court, Second Department, Second District,
General Term, December, 1874.*

EXECUTION.—MOTION AND ORDERS.—PLACE OF TRIAL.
—SHERIFF.—DEFAULT.—ATTACHMENT.

After judgment by default against partners, and levy made, one partner had the default opened as against himself, and prevailed, on the defense that the firm were never indebted. *Held*, that so far as concerned the rights of an intermediate attaching creditor, the judgment was entirely impeached, and the latter creditor had the prior right to the avails of the levy.

The provision of subdivision 4, of section 401, of the Code of Procedure—requiring motions on notice to be made in the district in which the action is triable, or in a county adjoining that in which it is triable—can not be invoked to preclude a motion in several actions, not being triable in the same district nor in adjoining counties.

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In such a case the old practice is preserved by rule 97 of the supreme court.*

The defendant, George Lamoree, received, as sheriff of Dutchess, October 30, 1867, an execution in favor of J. Frank Phillips against Henry W. Wheeler and two others, partners, for three thousand one hundred and forty-one $\frac{28}{100}$ dollars on a judgment recovered in the first judicial district, New York. On the next day he received a warrant of attachment in an action brought in Greene county, in the third judicial district, by Charles Cornwall against the same defendants, and thereafter an execution therein for two thousand six hundred and fifty $\frac{78}{100}$ dollars. On the same day, October 31st, 1867, he levied on all the property of the said defendants which he could find in Dutchess county, which was sold, and the proceeds, amounting to the sum of one thousand seven hundred and seventy-nine $\frac{44}{100}$ dollars, were in the hands of the sheriff at the time the order now appealed from was made.

December 24th, 1867, an order was made by Mr. Justice A. P. JAMES, setting aside and vacating the judgment in favor of Phillips. That order was appealed from, and June 14th, 1869, modified on appeal to open the judgment and permit defendant Wheeler, who alone applied, to answer, and stay proceedings till trial of the issue thereon. The referee, on the trial of that issue, found that the defendants were not indebted to the plaintiff for any of the matters or things demanded.

June 22d, 1869, Lamoree commenced an action of interpleader in the second judicial district, Dutchess county, against Phillips, Cornwall, and others, in which

* As to the rule for making one motion in several causes, see *Jackson v. Sheldon*, 9 *Abb. Pr.* 127; *Holmes v. Williams*, 3 *Cal.* 98; *Pell v. Jadwin*, 3 *Johns.* 448; *Phelps v. Hall*, 5 *Id.* 367; *Parent v. Kellogg*, 1 *How. Pr.* 70; *Alcott v. Davison*, 2 *Id.* 44; *Cooke v. Smith*, 7 *Hill.* 186; *Dederick v. Hoysdradt*, 3 *Code R.* 86.

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Phillips answered. A defendant, Smith, demurred. The demurrer was overruled by Mr. Justice BARNARD, and judgment given for Lamoree on the demurrer was reversed by the general term.

October 12th, 1872, on a motion in behalf of Lamoree, an order was granted at special term, in the second judicial district, Dutchess county, by Mr. Justice BARNARD, directing that the above mentioned moneys received by Lamoree as sheriff be by him paid to the assignees of Cornwall's judgment. From this order an appeal to the special term is now taken.

E. J. Sherman for the plaintiff, appellant (Phillips). —I. The order appealed from was erroneous, because Lamoree had commenced an action in the supreme court for the same relief sought by the motion, the issues of fact in which action were still pending and undetermined.

Mr. Justice BARNARD's judgment in the action of interpleader having been reversed, Lamoree was not justified in again applying to him for relief on the same state of facts as he did do. Lamoree should have appealed to the court of appeals.

II. This motion was not made in the proper district. *Code of Pro.*, § 401, sub. 4.

III. The Phillips judgment, and not that of Cornwall, is entitled to the money.

The former was set aside only so as to allow the defendant Wheeler to answer, and proceedings were stayed as against his individual property only. The execution under Phillips's judgment is now available against all other property.

Anthony & Losee for George Lamoree, respondent.

BY THE COURT.*—TAPPEN, J.—The sheriff of Dutch-

* Present—TALCOTT and TAPPEN, JJ.

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ess made a motion at the Dutchess special term, upon notice to all the judgment or attachment creditors in these actions, for directions by the court as to the disposition of moneys in his hands, arising from the sale of the partnership property of the judgment debtors. The plaintiff, Phillips, obtained a judgment by default against all the defendants as partners, and filed transcript and issued execution to the sheriff of Dutchess, pending which the defendant, Wheeler, by order of the court, had the judgment set aside as to him, and was allowed to come in and defend on the merits; judgment was subsequently rendered at the trial in his favor, the referee finding, "that the defendants were partners; that the sums of money alleged by the plaintiff to have been loaned to the defendants were not so loaned; and that the defendants were not indebted to the plaintiff." The defendant, Wheeler, being the only party defending, took judgment against the plaintiff dismissing the complaint, and for costs; and the judgment stands unreversed. The plaintiff asks to have the money in the sheriff's hands applied to the execution which he issued on the judgment before it was opened by the defendant Wheeler, upon the ground, that it was not opened as to the other defendants, although it was upon a claim against all the defendants as partners. The plaintiff's priority is contested by Charles Cornwall, a creditor who is next in order of time, by reason of an attachment which the sheriff of Dutchess received and levied on the partnership property. The sum of money in the sheriff's hands is about one thousand seven hundred dollars, and as either of these claims will more than exhaust the fund, the claims of the twelve subsequent execution creditors do not need to be considered at present.

The plaintiff's judgment stands impeached by the decision against him on a trial of the action on its merits; the fact that the other two defendants did not

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seek to defend, and that on a trial demanded by the remaining partner (the defendant Wheeler) the plaintiff was defeated on the merits, shows collusion, and goes to the right to demand the money now in dispute. The judgment obtained by the attaching creditor, Cornwall, is next in order, and is now entitled to be first paid. The plaintiff, Phillips, objects that the sheriff could not waive the motion in Dutchess, for the reason, that the plaintiff's judgment was recovered in New York, and the Cornwall judgment in Greene. The Code, sec. 401, subd. 4, provides, "that motions upon notice must be made within the district in which the action is triable, or in a county adjoining that in which it is triable," "and no motion on notice can be made in the first judicial district, in an action triable elsewhere."

A literal construction of this language would leave the sheriff without any place to make the motion. It is conceded on the part of the sheriff, that neither of the actions is in the second judicial district, nor in a county adjoining the county of Dutchess; but the sheriff could not be heard if he did not bring all the claimants to the fund before the court.

The plaintiff, Cornwall, whose action was triable in Greene, could object to any motion in the first district, and the plaintiff, Phillips, whose action was triable in New York, could object as well to a motion in Greene as he did to a motion in Dutchess. If the construction claimed by the plaintiff Phillips, for this section, is held to govern this proceeding, such a rule would leave the public officer without remedy, because of the conflicting parties who claim the fund in bank having their judgments in several counties, not being the same judicial district, and not being adjoining counties. This provision of the code can not be held applicable. The proceeding is one not embraced in that section, but rule 97, applying to cases not regulated by statute, must apply. In other words, when one motion is necessarily

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made and entitled in several actions pending in different counties and judicial districts, the practice under section 401 of the Code does not apply from the very circumstances of the case.

On the question of jurisdiction, and on the merits, the order of the special term should be affirmed, with costs.

FLANDERS *against* ODELL.

*Supreme Court, Second Department, Second District;
General Term, December, 1874.*

REFERENCE.—ACCOUNT.—ATTORNEY AND CLIENT.—
CONTRACT.

In an action on an account for services and disbursements,—*e. g.*, an attorney's bill,—where the complaint alleges an agreement to pay a sum certain, if defendant does not contest the items of expenditure, but denies the special agreement and alleged value of the services,—a compulsory reference can not be ordered.

The case of *Evans v. Kalbfleisch*, 16 *Abb. Pr. N. S.* 14, followed.

It seems, that a client sued on an attorney's bill, may object to the trial being referred to an attorney.*

John Flanders and R. McK. Ormsby, brought this action in this court against Moses Odell, to recover on an account for services rendered by them as attorneys and counsel, said account exhibiting seventeen items of charge on the debit side and one item on the

* Compare *Steinbach v. Columbian Ins. Co.*, 2 *Cai.* 129, 133; *S. C.*, *Col. & C. Cas.*, where, in an action on an insurance policy, it is said that, an underwriter being a party, underwriters would hardly be proper jurors.

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credit side thereof, and showing a balance of eleven hundred and twenty-six dollars and thirty-five cents due.

The defendant put in a general denial, an allegation of payment (two hundred and sixty-five dollars), an allegation of the worthlessness of the services, also charging negligence, and a counter claim for damages in the sum of five hundred and seventy-five dollars for wrongful counsel and negligence. The answer also stated that the employment of the plaintiff, Ormsby, was by the plaintiff, Flanders, on his own responsibility and not at the instance or request of defendant.

In May, 1874, an order of reference was granted at special term, in Kings county, on appeal to the general term, from which order was taken.

Close & Robertson, for the defendant, appellant.

John Flanders, for the plaintiff, respondent.

BY THE COURT.*—TAPPEN, J.—The action is upon an attorney's bill; the trial does not necessarily involve the examination of a long account between the parties, inasmuch as the defendant does not contest the items of expenditure charged against him by the plaintiff.

The defenses, that the services are not worth the sum named or claimed, and that the defendant did not make the contract to pay the plaintiff a sum certain, as set forth in the complaint, and that the defendant has fully paid the plaintiff, are questions of fact, the decision of which will chiefly govern the final result.

In an action of this nature, while it may be proper to send the case for trial to an attorney as referee, in many instances, yet it may also be proper, in some instances, not to compel the defendant to submit his defense to such a tribunal.

* Present, BARNARD, P. J., TAPPEN and DONOHUE, JJ.

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And, for these reasons, as well as because the examination of a long account is not necessarily involved, the reference should not be ordered.

In *Evans v. Kalbfleisch* (16 *Abb. Pr. N. S.*, 14), where the plaintiff (an attorney) averred a special contract, and also a *quantum meruit*, the superior court, at general term, reversed the order of reference, and the grounds, reasoning, and authorities cited, will be found decisive in this case.

Order of special term, directing reference, reversed, with ten dollars costs, to abide the event.

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THE OGDENSBURGH & CHAMPLAIN RAIL-
ROAD COMPANY *against* THE VER-
MONT & CANADA RAILROAD
COMPANY.

*Supreme Court, Special Term; Fourth District,
July, 1874.*

PARTIES.—DEMURRER.—APPEARANCE.—FOREIGN
CORPORATION.—SERVICE.—CAUSE OF ACTION.
—RAILROAD COMPANIES.

A defendant, by demurring solely on the ground that the court has no jurisdiction of the person, and by putting in a qualified appearance for that purpose alone, does not confer jurisdiction.*

A demurrer assigning as its ground that the court has no jurisdiction of the person of the defendant, does not raise any question as to the regularity of the proceedings by which service of process has been made; but only the question whether the defendant is such a per-

* See *Hoag v. Lamont*, p. 91 of this vol.; *Sanborn v. Lefferts*, p. 42.

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son as can be subjected by process to the jurisdiction of the court.

In an action by a resident of this State, against a foreign corporation, the court can not acquire jurisdiction of its *person*, or legally render a *personal* judgment against it, unless the corporation elects voluntarily to appear.*

Individuals sued in their capacity of trustees appointed by a court of another State, over an insolvent corporation of such State, and for acts done as such trustees, stand upon the same footing, in this respect, as a foreign corporation. The court can not gain jurisdiction of the persons of any of such a board of trustees, by the personal service of process within this State.

In general, a corporation can not maintain an action seeking to have its own contract, voluntarily entered into, canceled, merely because *ultra vires*.

The superintendent of a railroad company, in possession of the road under a corporation or trustees for creditors, is not a proper party to an action to recover possession of the road.

A contract by a New York railroad company, giving the possession and control of its road to a foreign connecting railroad company,—*Held*, authorized by the acts of 1839 and 1869 as to connecting roads, and not void as against public policy.

Demurrer to complaint.

The Ogdensburg & Lake Champlain Railroad Company sued the Vermont & Canada Railroad Company, John Gregory Smith, Benjamin P. Cheney and Joseph Clark, managers and trustees of the Vermont Central Railroad Company, John Schrier and The Central Vermont Railroad Company.

The complaint averred that the plaintiff was a corporation organized under the laws of the State of New York; that since August, 1865, it had been the owner of a railroad extending from Ogdensburgh to Rouse's Point, and that it operated the same for public use up to March 1, 1870.

That in February, 1870, an agreement in writing was

* See 11 *Albany L. J.*, 122.

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entered into between said plaintiff, under proper authority from its directors, with the Vermont & Canada Railroad Company and the managers and trustees of the Vermont Central Railroad Company, attested by its vice-president, and under the hands and seals of Gregory Smith, Benjamin P. Cheney and Joseph Clark, as trustees, receivers and managers of said last-mentioned road.

That said railroads, defendants, had no corporate powers in the State of New York, nor any special recognition of corporate powers therein.

That before making said agreement, The Vermont Central Railroad Company had become insolvent, and the defendants, Smith, Cheney and Clark, had, by the courts of Vermont, been appointed trustees, managers and receivers thereof, and at the time of making said agreement, said Vermont Central Railroad was insolvent, and was held and controlled by, or in the interest of, said trustees.

That the Central Vermont Railroad Company is a corporation, created by the laws of Vermont in November, 1872, with authority to assume and perform all the contracts of the trustees, managers and receivers of the Vermont Central Railroad Company and the Vermont & Canada Railroad Company, and that said Central Vermont Company claims to have succeeded to said agreement of 1870.

That on March 1, 1870, said plaintiff, in pursuance of the aforesaid agreement, delivered the possession and control of its railroad to the said parties therein named, who received and still hold the same; and that said Central Vermont Company and John Schrier, claiming under said railroads, have exclusive possession and control of said Ogdensburg & Lake Champlain Railroad, receiving and enjoying its earnings.

That all the defendants but Schrier are non-residents; that Schrier is superintendent and agent for the

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other defendants, and as such, has the possession and charge of said road.

That recently the claim has been set up by the people of the State of New York, through their attorney-general, that the aforesaid agreement of 1870 was beyond the corporate powers of the plaintiff, and was, and is, illegal and void ; that the transfer under it, of possession of said road, with the right of operating the same as a public route of travel, was illegal and unauthorized ; and that such transfer and the cessation thereby and thereunder for more than one year, of the maintenance and operation of said road by the plaintiff itself, amounts, in law, to a suspension of the ordinary and lawful business of the plaintiff, and subjects it to a forfeiture of its charter, &c. ; and that in January last, the people, by their attorney-general, commenced an action against this plaintiff, setting up the matters aforesaid, and demanding judgment of forfeiture of its charter ; which action is still pending.

That from the time of making said agreement to the present, the plaintiff has maintained its corporate organization, held elections, meetings of its directors, paid interest on its bonds and other current pecuniary obligations, and made dividends on its stock from moneys received under said agreement ; that its road has been kept up and maintained for travel and transportation, and the public duties incident to the franchise have been performed and fulfilled by said defendants and all the payments required by said agreement have been made.

That said agreement of 1870 was entered into in good faith, upon the belief that parties thereto have the right so to do, and upon the advice of counsel upon whom they relied ; that if the agreement be adjudged within the corporate powers of the plaintiff, and the surrender of possession and use of its road legal, the pecuniary result is not objectionable, and plaintiff would be con-

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tent therewith, but if said agreement was unauthorized or illegal, and subjects it to a forfeiture of its charter, it desires to be relieved therefrom and restored to the possession of its road.

The court is then asked to adjudge and determine whether said agreement, and the transfer and delivery of possession under it, with its exclusive use, was unauthorized or beyond the corporate powers of plaintiff.

The defendants, the Vermont and Canada Railroad Company and the Central Vermont Railroad Company, appeared specially in the action for the purpose of objecting to the jurisdiction of the court, and for that purpose only; and each severally, specially demurred to the complaint, because it appeared on the face thereof that the court had not jurisdiction of their persons.

The defendants, John Gregory Smith, Benjamin P. Cheney and Joseph Clark, sued as trustees, managers and receivers of the Vermont Central Railroad Company, and not otherwise made parties to the action, also appeared specially and solely for the purpose of objecting to the jurisdiction of the court and severally demurred to the complaint, because it appeared on the face thereof that the court had not jurisdiction of the person of said defendants.

The defendant, John Schrier, demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action against him.

Wm. M. Evarts and *L. Hasbrouck, Jr.*, for the plaintiff.

E. C. James, for the defendant.

JAMES, J.—As to all the defendants, other than Schrier, the only question now in the case is as to the jurisdiction of this court over the persons of said defendants, for without such jurisdiction it can render no personal judgment against them.

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It was urged that by interposing their demurrers the defendants had conferred on the court jurisdiction of their persons, and this would be true had the demurrers been upon any other ground ; but being solely on the ground that the court had not jurisdiction of their persons, and that they made a qualified appearance for the purpose of testing that question, and for no other purpose, it had no such effect. A defendant in an action has the right to appear specially for the purpose of testing the question of jurisdiction, and by so doing does not confer jurisdiction generally in the cause (*Allen v. Malcolm*, 12 *Abb. Pr. N. S.*, 335 ; *Sullivan v. Frazee*, 4 *Robt.*, 616 ; *Seymour v. Judd*, 2 *N. Y.*, 464, 8 ; *McCormick v. Penn. Cen. R. R. Co.*, 49 *Id.*, 303, 9 ; *Cumb. Coal Co. v. Sherman*, 8 *Abb. Pr.*, 243).

The Code permits a defendant to demur on the ground that the court has no jurisdiction of his person when this fact appears upon the face of the complaint ; and when it does not so appear, to take the objection by answer (*Code*, §§ 144-147). But such objection is not to be deemed waived, even if not taken by demurrer or answer (*Code*, § 148) ; much less is it to be deemed waived by an appearance for the sole purpose of raising it in the exact method provided by the Code (4 *Robt.*, 616).

This objection to the jurisdiction of the court does not mean that the suit has been irregularly commenced, but that the person named as defendant is not subject to the jurisdiction or order of the court (*Nones v. Hope Ins. Co.*, 5 *How. Pr.*, 96). Hence the inquiry is not as to the irregularity of the proceedings by which service of the summons has been made, but whether the defendant is such a person as can be subjected by process to the court's jurisdiction.

One over whose person the court has no jurisdiction, is not bound to wait until final judgment and then seek relief by motion to set it aside. The Code gives him

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the right to present that contingency by pleading, and by appearing to exercise that right he does not waive it, nor in any way impair the force of the objection. To hold otherwise would make the means provided for presenting that issue, destroy the issue itself. In my judgment the issue was properly taken by demurrer, and such demurrers present issues of law for the decisions of the court (*Code*, § 249; *King v. Poole*, 36 *Barb.* 242, 7).

An action against a foreign corporation is authorized by section 427 of the Code, but before the action can proceed or the court render judgment either *in rem* or *in personam* it must have jurisdiction of the property, or the person of the defendant.

This is not a proceeding *in rem*, but an action against the persons of the defendant.

At common law the courts of this State had no jurisdiction of the persons of foreign corporations, nor have our statutes provided any mode whereby the personal appearance of foreign corporations can be compelled. Such companies may be proceeded against by attachment, and if property is seized, judgment may be rendered against such property without a personal appearance by the defendant. It is only in cases of voluntary appearance that our courts can have jurisdiction of the persons of foreign corporations (*McCormick v. Penn. Cent. R. R. Co.*, 49 *N. Y.*, 303).

As was said in *Hulburt v. Hope Ins. Co.*, 4 *How. Pr.*, 275, the service of a summons upon a president of a foreign corporation, who happens to be temporarily in this State, and who does not voluntarily appear, does not give the court jurisdiction of the defendant for the purpose of rendering a personal judgment, and so of service by publication made under the Code, section 135; either service must be regarded, for all practical purposes, as simply a statutory notice, that proceedings are about to be instituted against the defendant's prop-

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erty An action against a foreign corporation is now, as a suit was formerly, a proceeding against its property only, unless there is a voluntary appearance by the defendant (*Code*, §§ 227-243, 427; 2 *Rev. Stat.* 459). It was held in *Brewster v. Mich. C. R. R. Co.*, 5 *How. Pr.*, 183), that in a case where the service of the summons was made upon the proper officer of a foreign corporation, no attachment having been issued, and no voluntary appearance by the corporation, the courts of this State did not get jurisdiction of the defendants so as to render a personal judgment. The extent of the power of the court, in such case is to subject the property and effects of such corporation within the state, by a judgment *in rem*, to the payment of its debts, &c. (*Cumberland Coal Co. v. Sherman*, 8 *Abb. Pr.*, 243; 49 *N. Y.*, 303).

Therefore, in an action by a resident of this State against a foreign corporation, this court can not acquire jurisdiction of its person or legally render a personal judgment against it unless such corporation elect voluntarily to appear therein.

As the complaint in this case shows the said defendants to be foreign corporations, and there not having been any voluntary general appearances therein, no jurisdiction of their persons has been obtained, and the demurrers of the said defendants are well taken.

As to the defendants, Smith, Cheney and Clark, they are not sued as individuals, or for any act done as individuals, but as trustees appointed by the courts of another State, over an insolvent corporation created by such State, and for acts done as trustees under such appointment. Jurisdiction over the persons of such trustees, for acts done in their capacity as such, must stand on the same footing as the foreign corporation which they represent. As such they constitute a *quasi* corporation foreign in all that relates to official acts or duty, and must be so treated by our courts whenever they decline our jurisdiction. In an action against

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them, for acts in their official relation, they may submit to the jurisdiction of our courts by a voluntary appearance, but if they do not, the courts have no power to coerce their official personal appearance. Even as against a non-resident individual, our courts can not acquire jurisdiction without a personal service of the summons within the State, or a voluntary appearance (*Schwinger v. Hickok*, 53 *N. Y.*, 280), and personal service in this State, on one of several foreign trustees, will not confer personal jurisdiction over the persons of the body of trustees to which he belongs, nor over the person of the individual served, because not served as an individual, but as one of the several members of a board without personal claim against him. In fact, the person of a foreign corporation, can not be forced by the process of a court of this State, out of the State which created it, into its own jurisdiction, and so of foreign trustees of foreign corporations for acts done in their representative characters. If the persons of foreign trustees were subject to the jurisdiction of the courts of this State, for acts done as such, they might sometimes be placed in an awkward predicament. They are officers of the court appointing them, subject to its orders and authority; if subject to the jurisdiction of courts of other States, they might be adjudged to do acts which the court appointing them might not approve, or refuse to recognize, and punish them for doing. Foreign corporations and trustees of such corporations may sue in the courts of this State (*Runk v. St. John*, 29 *Barb.* 585), as a voluntary act. This is wholly upon the ground of comity, and therefore, our courts will not entertain the lien of a foreign assignee or receiver in opposition to a lien created by our own laws.

I think these demurrers well taken; that as shown by the complaint, this court has not jurisdiction of the persons of said trustees or either of them.

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The purpose of this action is to avoid an agreement made by the plaintiffs with the defendants, on the ground of want of power and authority in the plaintiff itself to enter into it. Can an action for such purpose be maintained by one of the parties thereto? This was questioned on the argument, and the point pressed with considerable force, the counsel insisting that as plaintiff had entered into the agreement of its own volition, submitted to it for four years, reaped its fruits and distributed them among its stockholders, it could not now be heard to say that its act was unauthorized and illegal, even though such were the fact. Being in *pari delicto*, it could have no standing in court to be relieved from its own wrong.

It is a general principle of law that no court will lend its aid to a party who founds his cause of action upon an illegal agreement, and, if from the plaintiff's own statement of the case, the cause of action appears to arise *ex turpi causa*, or by the transgression of law, or because unauthorized, he has no right to the assistance of the court, and this is not out of regard for the defendant, but because the court will not lend its aid to such a plaintiff. Courts of equity generally follow this rule of the common law and refuse to all parties concerned in illegal agreements or other illegal transactions, its aid for relief. The only exceptions are when the unlawful acts were against public policy, and in such cases affording no relief except such as public policy demanded, and no redress to either party further than such as might flow from the relief necessarily granted.

This is not a case, as I shall hereafter show, calling for the interference of the court in plaintiff's behalf on the ground of public policy; indeed, the aid of the court was not invoked on that ground.

The complaint, after stating the plaintiff's corporate character, its ownership of the railroad, its continued

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existence as a corporation, the maintenance of its road for public use, the performance of all duties incident to the franchise, sets out the agreement of 1870, the delivery of possession and use and operation by defendants, its receipt and distribution of the money paid under said agreement, and expresses its satisfaction with the pecuniary arrangement, if legal, and then claims the transaction as unauthorized, and asks judgment of the court that it be declared void, and an order directing its return to said plaintiff, &c.

The complaint further avers the defendant, John Schrier, to be the superintendent of said railroad, as agent, acting under the other defendants. It does not aver or show that Schrier has or claims any possession or control in his own right, or that he had anything to do in any way with the agreement under which possession of said road was obtained.

From the complaint fairly construed it appears that he was simply an agent in possession for his principal. As such, he was neither a necessary nor proper party (*Code*, § 118). Neither having or claiming either right or interest in the subject-matter of the controversy, a complete determination could be had without his being a party. He was not a tenant in possession. His was the possession of his principal, against whom a judgment for the possession of said road could be enforced. It was held in *Garr v. Bright* (1 *Barb. Ch.*, 157), that "A person could not be made party defendant on the ground of his being the agent of the party interested, where no specific relief was asked against him, and this complaint contained no allegation that he acted as such agent in relation to the transaction, or had an interest in, or connection with the subject-matter of the litigation. So in *Boyd v. Vanderkemp* (1 *Barb. Ch.*, 273), where an agent defendant made default, it was held erroneous to make a mere agent a party defendant in a suit for specific performance of a contract, and the

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court even refused to allow judgment to pass against him for costs, on the ground that he was improperly made a party. It would, therefore, seem that Schrier was not a necessary or proper party, and that as against him no cause of action is stated in the complaint.

But the more important question is, was the agreement of February, 1870, within the corporate powers of the plaintiff? This is a question of much importance to the parties, and of great importance to the public at large.

Upon this question I shall quote from an opinion by REDFIELD, J., given to the parties at the time this contract was made, furnished me on the argument.

He says: "The right to build, own and operate railways is not necessarily a corporate function; it might just as well be done by natural persons, but as it pertains to intercommunication in a state or nation, it is of a prerogative character, and can not be exercised without the consent of the sovereign power, express or implied (*Bank of Middleburg v. Edgerton*, 30 *Vt.*, 182, 190). The English courts have held that a corporation created expressly for the purpose of operating a railway, could not either assign or lease the same as a whole either for a definite or indefinite period, without consent of the legislature, either express or implied.

"Although this opinion was reached with acknowledged reluctance and great doubt, it seems to have been acquiesced in there, and been universally adopted in this country. The principle upon which it has prevailed seems to be that the sovereignty of the State having conferred an important function and in many respects of a prerogative character, upon these corporations, the trust thereby became strictly personal, and the State had the right to insist upon retaining the original guaranty thereby afforded for its faithful performance, at least until consent was given by some

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legislative act that it might be transferred to others. But these rules have naturally received a somewhat limited and strict construction. It was held by the English courts at an early day, that any mere traffic arrangement between different corporations forming a continuous line, although the effects were to give the entire use of one line to another company, and in return to guarantee a certain dividend on the stock of the company owning the line, as an equivalent for the benefit of the entire traffic, was not on that account objectionable, and did not require confirmation by any legislative act. This was decreed by a unanimous opinion of the exchequer chamber (9 *Exch.*, 642), and has never been departed from. It was regarded as a mere traffic arrangement with connecting roads, to consolidate the working of an entire line under one control, in order to secure greater efficiency and less expense. The result of this case and of all the cases upon this point, is that a railway company has the right to make any contract for the use of its own line within its charter powers, and these charter powers are determined not only by the terms of its original charter, but by all the general statutes of the State in force at the date of the charter, or which have been subsequently passed."

In this case as I have before said, no question is made as to the powers of the Vermont corporation, or the trustees and managers thereof, to make the agreement in question or to the validity of the agreement in that State. The action is placed wholly on the plaintiff's want of power.

It should be borne in mind that these railroads, plaintiff and defendants, are connecting roads, part of a connecting line, between the waters of the great west and the seaboard. The agreement in controversy, which is made a part of the complaint, asserts that "said railroads form one connecting line of railroad traffic from the foot of ship navigation on the great

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lakes at Ogdensburg to White River Junction and Windsor, Vermont, and that the traffic and business of each of said roads are so intimately connected, that it can be carried on and conducted to the greatest advantage of all concerned by having all the said roads under one management; that as a consolidation might ultimately be found desirable for the benefit of the public and of the stockholders of all the roads, as provided for by the act of 1869, a temporary arrangement is most desirable until it can be clearly seen, whether full consolidation to the extent authorized by said act, will be advantageous, &c."

These recitals sufficiently explain the objects and purposes of said agreement, and show the motives which actuated its consummation.

At an early day the legislature of this State contemplated a union of connecting railroads, either by consolidation, leasing or otherwise, so as to form a continuous business line, under one management, whenever the owners deemed such a method most likely to aid in facilitating and in cheapening transportation. As early as 1839 (*Laws of 1839*, ch. 218), the legislature of this State enacted that it should be "lawful for any railroad corporation to contract with *any other* railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract." That is precisely what has been done in this case; the O. & L. C. Railroad Company has contracted with defendants for the use of its road, and they are using it in the manner provided for in the contract. It is urged that these defendants are foreign corporations, and that said act does not include foreign corporations. It does not in terms say "foreign corporations," but the language is broad enough to include all corporations, it says "any other corporation," and as the greater always includes the less, the act should be so construed as to apply to all corpora-

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tions that come together, and are capable of forming a continuous line of railroad connection, whether all are located in this State, or one in this State and one in another.

The point is taken that this act is limited to corporations and does not reach this case, because the trustees and managers of an insolvent corporation formed one of the several contracting parties on one side. I can not concur in this view. The terms of the act were used in a broader sense, and include all or any railroads, whether owned by a corporation, or by one or more individuals. The roads and their use were the subject of consideration and enactment; not the owners.

The principle of union, or lease, or consolidation of railroads has, since 1839, been repeatedly recognized and provided for in subsequent legislative enactments in this State. In 1855 (ch. 302), a statute was passed, and re-enacted in 1867 (ch. 254), entitled "An act in relation to railroads held under lease," and declaring that any railroad corporation created by the laws of this State, or its successors, now being the lessee of the road of any other corporation, might take a surrender or transfer of the capital stock, &c.; and again in 1864 (ch. 582), conceding the general principle, it was enacted by the second section, "that when the railroad of any railroad corporation shall be leased to any other railroad corporation, or to any *person or persons*, such lessee shall maintain fences," &c., thus distinctly recognizing the right of individuals to lease as well as corporations. In 1869 (ch. 844), the act of 1867 was amended, requiring any railroad corporation, being the lessee of any other railroad, to make to the State engineer a report of such facts, concerning the operation of such leased road, as the lessors would otherwise be required to make, &c. This was followed by another statute in the same year (ch. 917), declaring that it may and shall be lawful for *any* railroad com-

pany or corporation organized under the laws of this State, or of this State and any other State, and operating a railroad or bridge, either wholly within, or partly within and partly without, this State, to merge and consolidate its capital stock, franchises and property with the capital stock, franchises and property of any other railroad company or companies organized under the laws of this State, or under the laws of this State and any other State, or under the laws of any other State or States, whenever two or more of the companies or corporations so to be consolidated, shall or may form a continuous line of railroad with each other, or by means of any intervening railroad bridge or ferry.

Thus is presented a series of legislation in this State, beginning in 1839 and continuing up to and including 1869, authorizing, recognizing and regulating the use of one railroad by another, partially or exclusively, by contract, lease or consolidation; and the operations of the many railroads in this State in that method since those enactments, show that between them, union and consolidation is the order of the day. The receipts and benefits have become too apparent now to be stayed; it is one of those steps of progress necessary to make these great thoroughfares of public travel and traffic to meet the requirements of commerce and the emergencies of the age.

In my judgment, the act of 1839, within its fair scope and intention, authorized the plaintiff to make the agreement it did with the defendants, and that such authority is reiterated and enlarged in the act of 1869, it being but an amplification of the act of 1839, perhaps deemed necessary to cover such cases as these roads at Rouse's Point, and the Great Western and New York Central at Niagara Falls. If right in this view, it follows that the agreement in question was not *ultra vires*.

The present tendency of judicial decision upon the

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powers of corporations to enter into contracts to promote the object of their incorporation, is well set forth by Justice POTTER in the recent case of the Town of Middletown v. R. & O. R. R. Co. (43 *How.* 489). He says: "I think it will hardly be contended at this day, that corporations can perform no act, and can make no contract, but such as the statute in express language authorizes. The contrary is true. They being invested with the powers of natural persons for the purposes specified, to a certain extent may enter into every contract to carry out that object, which is not in violation of some public law, or contrary to public policy."

As above shown, the contract now in question, so far from violating any public law, is authorized by the statute of 1839 and 1869. It is also fully in accord with public policy as decided by the court of appeals in *Merrick v. Van Santvoord* (34 *N. Y.*, 208).

Judgment is directed for the defendants, upon each of the several demurrers, with costs to the defendant Schrier.

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HENRY BERGH'S CASE.

*New York General Sessions, February, 1875, before
HON. JOHN K. HACKETT, Recorder.*

CONTEMPT.—GRAND JURY.—ATTORNEY-GENERAL.
—DELEGATION OF POWER.—DEPUTY.

At common law it was a contempt of court for a witness or bystander to communicate with the grand jury touching a complaint under examination before them, without their request.

To constitute such communication a contempt under the New York statute relative to criminal contempts (2 *Rev. Stat.* 278, § 10), the manner of making it must involve some contemptuous behavior committed during the sitting of the court, and at least tending to impair the respect due to it.

It seems that the word "behavior" in 2 *Rev. Stat.* 278, § 10, subd. 1, providing for the punishment of disorderly, contemptuous and insolent behavior committed during the sitting of a court of record, may embrace the delivery to the grand jury of an aspersive letter from an unofficial person; for the grand-jury room is an extension of the court-room, and its session is a part of the session of the court.

But where the president of the American Society for the Prevention of Cruelty to Animals, while holding written appointments from the Attorney-General of the state and the District-Attorney of the county, authorizing him to act as deputy of each of those officers in prosecuting complaints within the cognizance of the society, addressed a letter signed by him as president of the society and under its seal, to the grand jury, reviewing and expostulating against a recent decision by them, ignoring a bill founded on a complaint for promoting a dog-fight which had been preferred by an agent of the society,—*Held*, that such letter ought not to be construed as designed to interrupt the administration of justice, but rather as having been sent in an honest endeavor to discharge official duty; and that, so construed, it could not be deemed a contempt.

The powers of the Attorney-General of the state of New York, and his authority to appoint a deputy, discussed in argument.

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The Grand Jury of the county on February 15th, 1875, made the following presentment:

NEW YORK, Feb. 15, 1875.

To his Honor, Recorder Hackett, presiding in Court of General Sessions:

DEAR SIR: The accompanying communication was received from Mr. Henry Bergh, president of the American Society for the Prevention of Cruelty to Animals, February 10, inst.:

We, the members of the Grand Jury, consider the sending of such letter on the part of Mr. Bergh as totally uncalled for, and reflecting upon our integrity as grand jurors. It has certainly never occurred within the experience of any of us to be called to account by a party to a criminal proceeding for what we may have done after calm deliberation and weighing of evidence. Thinking that some action in the matter, on the part of the court, would be right and proper in order to secure to future grand juries the respect which is their due, we leave the matter in the hands of the court, to be acted upon or not, as may be deemed proper.

Respectfully submitted,

CHRISTIAN S. DELAVAN,

Foreman.

THE AMERICAN

SOCIETY FOR THE PREVENTION OF
CRUELTY TO ANIMALS,

[SEAL.]

*Headquarters, Fourth Avenue, cor.
22d Street.*

NEW YORK, Feb. 10, 1875.

To Christian S. Delevan, Esq., Foreman of the Grand Jury, for the city and county, at present sitting:

SIR: On the 10th of December last were found a number of disreputable men engaged in a dog-fight in a back basement at 12 Rivington-street. Two savage bull-dogs had been fighting a moment before the arrival of the officers; and the respective owners of the animals

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were at the time handling the animals, their hands at the time being covered with blood, and the dogs terribly cut up by reason of the contest. The proprietor of one of the dogs and place where they fought was present, and the lease of the vile premises is in the possession of this society. This fellow and some of his comrades have been proceeded against before; but, as in the present instance, they have escaped through means which I forbear to mention. On Monday, the 8th inst., this case came up before your jury, and, notwithstanding these facts were fully represented, as I believe, these notorious ruffians and keeper of one of the most disorderly houses in this or any other city, was relieved of all responsibility, and, in his own language, since uttered to one of our officers, "was honorably acquitted." I think, on reflection, you will in a measure realize the discouragement I feel at finding my earnest and unselfish labors in the public service diverted from their legitimate ends by this decision of the grand jury, the inevitable consequence of which will be to double the already onerous duties of this society, and go far to make dog and cock fighting, if not respectable and honorable, at least tolerable in this city. I do not mean this as a censure, for your associates acted doubtless conscientiously, but erroneously. The result, however, is the same. A scandalous stain upon our civilization has been condoned, and these execrable wretches led thereby to believe, however mistakenly, that a certain amount of sympathy exists in this community with their atrocious calling.

"I have the honor to remain,

"Your obedient servant,

"HENRY BERGH, *President.*"

On February 16, Mr. Henry Bergh appeared voluntarily at the bar of the court with his counsel,—

Elbridge T. Gerry, who moved to quash the pre-

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sentment, and that it, with the letter, be stricken from the files of the court, upon affidavits showing the following facts:

On December 10, 1874, a warrant was duly issued and executed by the police, accompanied by officers of the American Society for the Prevention of Cruelty to Animals, against one Jefferson Carpenter, proprietor of the premises No. 12 Rivington-street, for using the same for the purpose of fighting dogs thereon, in violation of the statute.

Upon entering the premises, the officers found in the back basement a crowd of men surrounding two dogs, who were lying panting on the floor in the middle of the room, which was marked up in divisions, and part of which was scratched and torn up from the recent conflict. The animals were bleeding from various fresh bites on their bodies, and the arms and shirt sleeves of William Kelly, a notorious dog-fighter, who was holding one of them, was covered with fresh blood. At either end of the room stood pails with sponges and bloody soap-suds in them. In fact, to use the language of the spectators who met the officers as they were coming in, "the first round was just over." In the presence of the spectators and officers, and in full view of the scene just described, Jefferson Carpenter announced and proclaimed that "he was proprietor of the premises."

Carpenter was arrested and held to bail upon the complaint of Alonzo S. Evans, one of the officers of the society, who knew all about him, and procured from his landlord the lease to him of the premises in question.

Early in February, 1875, Henry Bergh, president of the society, called on the district-attorney, and laid the case upon the facts before one of his assistants, who advised that the facts were sufficient to warrant an indictment, and ordered the papers to be sent before the

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grand jury. Mr. Bergh at the time was authorized by the attorney-general of the State to appear and act for the people of this State as counsel in all actions or prosecutions instituted by the American Society for the Prevention of Cruelty to Animals, its officers or agents, or in which they are complainants, in which the attorney-general has a right to appear as representing the people, and also held a like authorization from the district-attorney of this county.

On February 8, 1875, the complaint went before the grand jury. Upon the back of it were indorsed the names of six witnesses for the people. There were eight present, including the complainant, in the witness-room, all of whom sent in their names to the grand jury. About noon the grand jury called before them two of the witnesses—Hartfield, who saw the scene described, and Roundsman Folk, who simply executed the warrant and arrested the parties. The examination of these two witnesses did not last fifteen minutes. Immediately thereafter the grand jury dismissed the remaining witnesses, without ever calling the complainant Evans, who was prepared and ready to substantiate his complaint, and had notified the grand jury of his presence. Shortly thereafter the grand jury dismissed the complaint and adjourned for the day. The next morning the prisoner, Carpenter, triumphantly announced that "the grand jury had not only honorably, but unanimously discharged him." Subsequent to this the grand jury came into court with the presentment and letter in question.

I. This presentment was made by the grand jury in order to justify their own misconduct in dismissing the complaint against Carpenter. (1.) They omitted to call the complainant Evans, whose sworn complaint was before them, and who stood ready with evidence to substantiate it. (2.) They called only two out of eight witnesses present for the people, six of whom

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were so named on the complaint before them. (3.) They were guilty of a gross misdemeanor in dismissing the complaint on this hasty and partial examination of the facts (*Astry on Grand Juries*, 11; 1 *Archib. Cr. Pr. & Pl.*, by Waterman, 322, note; *Somers on Grand Juries*, 28-31; Dawson's Case, 13 *Howell St. Tr.*, 455). (4.) And if these facts had been made known to the court before their discharge, they could have been punished for their misconduct (*People v. Naughton*, 7 *Abb. Pr. N. S.*, 425-6; *Hale P. C.*, 156, as to the proper punishment).

II. The presentment is false in fact besides being evasive. (1.) It states that Mr. Bergh was a *party* to the proceeding while the minutes of the grand jury prove the reverse. (2) It speaks of what the grand jury *may* have done after "calm deliberation" and "weighing of evidence." All the time they gave to the case was fifteen minutes, and the complaint was dismissed very shortly thereafter on the same day.

III. The motion is proper, because a presentment is a record equally with an indictment (4 *Bl. Com.*, 301; *Hawk. P. C.*, ch. 25, § 1; *Boutier Lexicon, in verbo*), and differs from the latter in that it states the facts and leaves it to the court to take action thereon or not. Hence, like an indictment, it may be quashed for fault or irregularity in the proceeding leading to it (*People v. Hulbut*, 4 *Den.*, 133).

The recorder directed the motion to stand over until after Mr. Bergh had explained the apparent contempt of sending the letter. He directed the following question to be put to Mr. Bergh:—

"Did you write, or cause to be written, and send or cause to be sent, the annexed original letter to the grand jury of this court at this term, with the intention that the said letter should reach the said grand jury?"

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Mr. Bergh replied, "I did, in view of the facts and under the circumstances stated and referred to in the papers which I now submit and hand to the court" (handing up the papers on the motion to quash).

The recorder directed the entry of a rule requiring Mr. Bergh to show cause why he should not be punished for a contempt of court.

Elbridge T. Gerry, in behalf of Henry Bergh, showed cause.

First, as to the law of contempts.

I. At common law, criminal contempts were of two kinds. (1.) *Physical*, consisting of acts of misconduct perpetrated by a person in immediate view and presence of the court; such as a breach of the peace, insolence to it or its officers, standing mute when arraigned to plead (*Amos' Ruins of Time*, 42; *Jacob's Law Dict.* "Mute;" 4 *Bl. Com.*, 326). (2.) *Constructive*, being acts committed without the immediate view and presence of the court, calculated to obstruct its administration of justice, or to impair the respect due to it or its officers; such as speaking disrespectfully of a grand jury (*Isaac Van Hook's Case*, 3 *City Hall Rec.*, 64, A. D. 1818), publishing in a newspaper defamatory articles concerning a grand jury (*Matter of Spooner*, 5 *Id.*, 109, A. D. 1820), or sending a letter to a grand jury improperly to influence their judgment in a matter pending or about to pend before them (*Commonwealth v. Crans*, 3 *Penn. Law Jour.*, 442, A. D. 1844), or sending a threatening letter to a prosecutor (*Matter of Stroug*, 5 *City Hall Rec.*, 8, A. D. 1820). (a.) The odious court of star chamber owed its power chiefly to its abusive exercise of process for actual or constructive contempts (*Burn on the Star Chamber*, 94, 114; *Star Chamber Cases*, 24, 46). Indeed, the threat (recorded by Shakespeare, "Merry Wives," act I, scene 1), "I will make a star chamber case of it," was no idle

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menace when applied to a person who ventured to criticise the action of the court. (b.) And the common law in regard to these offenses prevailed in this State prior to the Revised Statutes (Cases cited *supra*).

II. But in 1830 the Revised Statutes abolished the whole common law of contempts. (1.) They enacted (2 *Rev. Stat.*, 278, § 10), that "every court of record shall have power to punish as for a criminal contempt, persons guilty of either of the following acts, and no others: (a.) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. (b.) Any breach of the peace, noise or other disturbance, directly tending to interrupt its proceedings. (c.) Wilful disobedience of any process, &c. (d.) Wilful resistance to process, &c. (e.) Refusal to be sworn, &c. (f.) Publication of false report of proceedings." (2.) This enactment did away with all *constructive* contempts, and the revisers in their notes on this section say (Revisers' Notes, 5 *Edm. Stat. at L.*, 684-5, original note to §§ 10 to 15): "In preparing the preceding sections, the revisers have not designed to take from the courts of justice any power which was essential to the maintenance of their dignity, or the enforcement of their mandates. But they have herein pursued their general plan, to define and limit undefined powers wherever it was possible, as well for the information as the protection of the citizen; and they have supposed that their declaration and enumeration in a legislative act, would frequently prevent the necessity of resorting to them, and would strengthen the hands of the courts whenever their exercise became indispensable, by justifying an appeal to the written law. A solid and obvious distinction exists between contempts, strictly such, and those offenses which go by that name, but which are punished as contempts, only, for the purpose

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of enforcing some civil remedy. This distinction has been observed, and the former are intended to be included in the preceding sections. The latter class are treated of subsequently, among miscellaneous proceedings in civil cases. In the 4th part, many offenses which are now punished as contempts, and which are omitted in the preceding sections, will be included among misdemeanors. It can not be necessary at this day, to urge any reasons for substituting the trial by jury in all possible cases, instead of a trial by an offended tribunal." (3.) And they made the attempting improperly to influence a juror, which was previously, as shown, a constructive contempt, a statutory misdemeanor, triable and punishable as such (2 *Rev. Stat.*, 693, § 16).

III. The sending of the letter by Mr. Bergh was not an offense under the Revised Statutes. (1.) He did nothing in the "immediate view and presence of the court." These words mean ocular vision and physical presence. They are equivalent to the old common-law expression "in the *face* of the court" (2 *Bacon Abr. "Courts,"* 633). The word "immediate" is the opposite of "constructive." (2.) In *Hackley's Case* (24 *N. Y.*, 79), the witness refused to answer at the bar of the court, and besides willfully resisted the process of subpœna with which he had been served. (3.) The grand jury in the present case had dismissed the complaint about which the letter was written. They had no power to reconsider their action, and the case was not pending, and could not again come before them (*Reg. v. Humphreys, Carr. & M.*, 601; *Reg. v. Austin*, 4 *Cox Cr. Cas.*, 386).

Second, as to Mr. Bergh's right to send the letter under the power derived from the attorney-general and the district-attorney.

I. The attorney-general, at common law, was the chief legal representative of the sovereign in the courts ;

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and it was peculiarly his province and duty to appear for, and prosecute in behalf of, the crown in matters criminal as well as in certain matters civil. (1.) His office is one of great antiquity. (a.) Mr. Foss says (3 *Foss's Judges of England*, 44): "The designation '*Attornatus Regis*' was certainly adopted before 6 *Edward I.* (A. D. 1278), inasmuch as there are two instances in that year of such an officer appearing, without any name being mentioned." (b.) Mr. Reeves says (4 *Reeves' Hist. Eng. Law*, ch. 25, 122): "The king's attorney was the only law officer of the crown of that kind till the reign of *Edward IV.*" And he states the first patent of appointment which can be found, in 1472. (2.) His very place in court, upon any special matters of a criminal nature wherein his attendance was required, was "under the judges on the left hand of the clerk" (1 *Jacob's Law Dict.*, 174, *in verbo*). (3.) He represents the sovereign, in whose name all criminal process issue; and his power to prosecute all criminal offenses is unquestionable at common law (3 *Blacks. Com.*, 27; *Bur. Law Dict.*, *in verbo*). (4.) He had the peculiar power to institute criminal proceedings on his own information for misdemeanors, especially those affecting the public at large; and was the sole judge of what public misdemeanors he would prosecute (4 *Blackst. Com.*, 312; 2 *Woodeson Law Lect.*, 562; 1 *Chitty Cr. L.*, 844-5, enumerating his powers). (5.) At no time was his power in this respect ever attempted to be invaded, except on two occasions. (a.) The first of these was, says Mr. Chitty (1 *Cr. L.*, 844), "when the court of star chamber, in which the members were the sole judges of the law, the fact and the penalty, was used in the reign of *Henry VII.*, by *Empson* and *Dudley*, his corrupt and favorite ministers, as the engine of oppression to the subject, and of unjust emolument to the crown. (b.) When this court of star chamber was abolished, in 1540 (by act of 15 *Car.*, 1

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ch. 10), the ancient power of the attorney-general revived; and this especial power of prosecuting for misdemeanors seems to have been further confirmed to him in 1692, by statute (4 and 5 *Will. & Mary*, ch. 18), which checked the abuse then existing of private men laying their complaints before the court as the king's complainants. (c.) Wilkes' Case (12 *How. St. Tr.*, 1128; S. C., 19 *Id.*, 1102-4), was the second attempt to interfere with this power of the attorney-general. There the solicitor-general attempted to usurp his functions and file an information for libel. On objection made, Lord MANSFIELD held that the attorney-general represented the crown, except where the crown appointed other officers to represent it, and that no officer could usurp the functions of the attorney-general. (d.) This last case was in 1768. In 1770 an attempt was made in parliament, under color of revising the act of 4 and 5 William & Mary referred to, to deprive the attorney-general of his power. The attempt failed by a vote of 164 in the negative to 72 affirmative (16 *Hansard Parl. Hist.*, 1127-1211, containing the debate in full). (6.) Hence, as the great law officer of the sovereign, says Mr. Chitty, "the conduct, the continuance, the suspension, and the dropping the prosecution are left entirely to his discretion; . . . his power remains as at common law, without diminution, and without control" (1 *Chitty Cr. L.*, 846; 1 *Hawk. Pl. Cr.*, Book 2, ch. 26, § 6). (7.) So absolute in this respect is his power, that he may *nolle pros.* an indictment without consulting any one, and the court will not interfere with him (*Regina v. Allen*, 1 *Best & S.*, 850; S. C., 9 *Cox Cr. Cas.*, 120; S. C., 8 *Jurist, N. S.*, 230; S. C., 5 *Law Times, N. S.*, 636; *People v. McLeod*, 1 *Hill.*, 405; S. C., 25 *Wend.*, 483, considered *infra*).

II. During the existence of this State as a province of Great Britain, there was always an officer known as

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the attorney-general, representing the sovereign, and possessing the common-law powers referred to. (1.) The journal of the legislative council shows this to have been the case from 1691 to 1775. (2 *Jour. Leg. Council*, 2007, *index in verbo*). (2.) Thus, in 1691 (1 *Jour. Gen. Assembly*, 12), it was voted *nem. con.*, "That whosoever advised his excellency to send the attorney-general out of this province during the sessions of this assembly, were obstructors of their majesties' interest and the good settlement of this government." His excellency said, in reply, he had pursued his instructions, and did not find it to be the duty of the attorney-general to attend this house; upon which the speaker produced an order of council dated 16th of April (1 *Jour. Leg. Council*, 3), declaring it was the duty of the attorney-general to attend this house. (3.) In 1691, April 24, Mr. Farewell was appointed "to doe the office of attorney-general to the house of representatives" (1 *Jour. Leg. Council*, 5). (4.) In 1700 (1 *Jour. Leg. Council*, 152), while the Earl of Bellemont was governor, Colonel Cortland, as chairman of a committee in the council, reported as to a certain bill, "That they are informed that his most Sacred Majesty hath been so gracious to this province as to appoint a chief justice and an attorney-generall, gentlemen educated and experienced in the law, who are dayly expected, for which reason they are of opinion that this bill be deferred until their arrivall." (5.) Shortly after, in 1701 (*Jour. Leg. Council*, 158), the lieutenant governor reported that "his majesty had, out of his own exchequer, . . . for the better administration of justice among you, settled £150 a year upon an attorney-general." (6.) Thirty years later, in 1734, the attorney-general was ordered (1 *Jour. Leg. Council*, 642) to prosecute Zenger for publishing a seditious newspaper. He did this upon his own information (17 *How. St. Tr.*, 679), and appeared and

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tried the case in person. Mr. Hamilton appeared and defended Zenger, who was acquitted. (7.) In 1743 (2 *Jour. Leg. Council*, 826), Richard Bradley Esq., "his majestie's attorney-general for this province," appeared before the council and objected to the passage of a bill to regulate prosecutions by information. He was heard (827), with Mr. Murray, of counsel with him, and the bill was defeated. (8.) In 1762 (2 *Jour. Leg. Council*, 1488), governor Robert Monckton sent the following message to the provincial council: "*Gentlemen*: No provision being made for defraying any expense, however necessary, in the carrying on prosecutions at the suit of the crown, the publick justice is in danger of suffering, and in some instances may be defeated. At the same time, I can not avoid observing that his majesty's attorney-general, the only officer who prosecutes for the crown, after the most able and faithful discharge of his trust, has no recompense adequate to services so essential to the community, the law not giving any costs in criminal cases. I therefore recommend these matters to your consideration, not doubting but you will provide for them amply and effectually.

" ROBERT MONCKTON.

" Fort George, New York, 24th of November, 1762."

III. The powers belonging to the office of attorney-general in England, at common law, are still possessed by the attorney-general of the State of New York; except where the same have been modified by statute. (1.) As already shown, the office existed *eo nomine*, as a well recognized common-law office during the entire time of the colonial government of this State. (2.) The Constitution of 1777 (1 *Rev. Stat.*, § 33, 1 ed., 34), while not naming this officer, evidently includes him in the category of those to be appointed by the council of appointment which it created. It pursued a similar course in regard to the supreme court; omit-

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ting, as Mr. Graham says (*Grah. on Jur.*, 140-1), "to define its powers, but regarding it as a court of well-established common law jurisdiction." (3.) Neither of the subsequent constitutions of this State attempted to define his powers, while they each recognize his office. Thus, by the Constitution of 1822 (1 *Rev. Stat.*, 1 ed., 45, art. 4, § 6), he was appointed by the legislature. By the Constitution of 1846 (art. 5, § 1), he is to be elected by the people every two years. (4.) Now, under the colonial government both the attorney-general and chief justice of the supreme court held commissions from the crown (*Zenger's Trial*, 17 *Howell St. Tr.*, 683, where one is given at length), "as emanating from the crown, at that time the source and fountain of justice both in England and in the then existing colony of New York, coupled with the fact that they were found in actual existence and force;" and that under them they were "exercising unquestioned powers, it is evident that, by common consent, the authority either of common law or of legislative enactment was regarded as belonging to them." (5.) The revisers, in presenting the Revised Statutes for enactment in 1830, say, in their note relative to the article on the attorney-general (see Revisers' Notes, 5 *Edm. Stat. at L.*, 523): "This chapter contains, amongst other matters, . . . the act concerning actions of ejectment commenced by the people of the State, and certain duties of the attorney-general. It will be seen that this chapter by no means embraces all the duties of the officers included in the executive class. Many of those duties are so intimately connected with the particular subjects to which they relate, that the attempt to treat them separately, it was found, would lead to great obscurity or useless repetition." (6.) Now, prior to the passage of the Revised Statutes, in 1796 (3 *Greenl. L.*, 265, ch. 8), the legislature passed an act providing for the appointment by

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the executive, by commission, of "a proper person for each of the districts hereinafter mentioned, each of whom shall be of the degree of counsel in the supreme court, and resident in such district, to the office of assistant attorney-general, hereby created." It was made the duty of these to attend the courts of oyer and terminer and jail delivery and general sessions of the peace; "and that, except with respect to prosecutions at the courts of oyer and terminer and jail delivery in the city and county of New York, *any regulation or establishment of the office of attorney-general*, whereby it may be supposed his duty to manage and conduct all public prosecutions at the courts of oyer and terminer and jail delivery, shall, after the passage of this act, cease." The act further provided for the calling on the attorney-general to prosecute, by the governor or justice of the supreme court, for the oath and salary of these assistants, and required the latter to aid the attorney-general in all prosecutions when called on to do so. (7.) The Revised Statutes provide (1 *Rev. Stat.*, 179, § 1), "It shall be the duty of the attorney-general to prosecute and defend all actions, in the event in which the people of this State shall be interested." (a.) This statute, as shown by the notes of the revisers, is simply declaratory of a part of the duty of the attorney-general. (b.) It may be urged with considerable plausibility, that the word "action" here is broad enough to include both civil and criminal proceedings. It is defined (*Laws of 1849*, ch. 438, § 5, 614) to be "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or *the punishment of a public offense*." (c.) The statute last quoted proceeds to define "actions" as being of two kinds—civil and criminal; and then declares "a criminal action is prosecuted by the people of the state as a party, against a person charged

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with a public offense, for the punishment thereof.” (d.) Now, although the code of procedure has no application to the criminal law of procedure, as it embraces enactments only as to civil procedure; yet these definitions are not so restricted, nor are they limited to the matters embraced in that act. (8.) But it is really immaterial to consider whether, under this statute, power is given to the attorney-general to prosecute in all criminal proceedings; because, as shown, he had this power at common law, and that power has not been taken away, except inferentially in certain cases. (a.) In 1841, the supreme court, in *People v. McLeod* (1 *Hill*, 377; S. C., 25 *Wend.*, 483), refused to compel the attorney-general to *nolle pros.* an indictment. (b.) Justice COWEN said (*at p.* 405): “At common law the attorney-general alone possessed this power, and might, under such precautions as he felt it his duty to adopt, discontinue a criminal prosecution in that form at any time before verdict. It probably exists unimpaired in the attorney-general to this day; and it has been by several statutes delegated to district attorneys, who now represent the attorney-general in nearly everything pertaining to indictments and other criminal proceedings local to their respective counties.” (c.) Then he goes on to say that the legislature, finding the power in so many hands, and fearing its abuse, passed a statute (2 *Rev. Stat.*, 728, § 54) forbidding district attorneys to enter a *nolle pros.* without leave of the court. (9.) True, the statute (1 *Rev. Stat.*, 180, § 5) makes it the duty of the attorney-general to attend certain courts of oyer and terminer and jail delivery, and prosecute there for the people on the requisition of the governor or of a justice of the supreme court. But this simply imposes on him a duty which he must perform when so required; just as other sections of the same statute compel him to prosecute on the requisition of certain other officials.

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(10.) So, his power to prosecute by information for certain misdemeanors has been substantially done away with by the constitutional proviso (Art. I., § 6) requiring an indictment. (11.) True, he has the power now to file certain civil informations, *e. g.*, a *quo warranto*; but in this he exercises a discretionary power which he had at common law, of which he was deprived in 1788 (1 *R. L.*, 108), but which was restored to him by the revised statutes in 1830. (*People ex rel. Peabody v. Attorney-General*, 13 *How. Pr.*, 179.)

IV. In view of these powers of the attorney-general, his delegation of authority to Mr. Bergh was alike lawful and proper. (1.) He had the power at common law to appoint clerks and deputies under him; and this, without impairing his official position, because the patent of his office recognized the privilege. (*a.*) Thus, in the first recorded patent of attorney-general to William Husee, in 11 Edward IV., the language is "*attornatus generalis in Anglia, cum potestate deputandi clericos ac officarios sub se in qualitercunque curia de recordo.*" (4 *Reeves' Hist. Eng. Law*, p. 122, *ch.* 25). (*b.*) "*Officiarius*" is a term used in the canon law to designate the person to whom the bishop commits the charge of his jurisdiction, and conveys more fully than any equivalent legal term the idea of deputy with full power (*Bour. Law Dict.*, *in verbo*; *Woodeson's Lectures*, 30, 305; *Merlin Rep. de Jurisp.*, *in verbo*). (2.) He exercised this power and privilege, and his right so to do has never before been questioned. (*a.*) Lord Coke says (4 *Inst.*, 101) of the clerk of the outlawries, in the court of Common Pleas, "this belongs to the office of the attorney-general, who exercised it by deputy." (*b.*) When Sir Samuel Romilly, in 1818, attacked the attorney-general in the House of Commons for misconduct in certain prosecutions, although it is stated he was represented on those occasions by Mr. Topping, no objection on that ground was

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preferred. (*Dodsley Ann. Reg. for 1818*, 4.) (c.) In *Regina v. Gardner* (1 *Car. and Kir.*, 628), in 1845, where the post office prosecuted a prisoner for stealing a marked letter with money, Mr. Whately claimed the right to reply on the ground that he represented the attorney-general. It was objected that the prosecution was not instituted by the crown, and the prisoner's counsel asked that the fiat of the attorney-general might be produced. The court said, "There is no such fiat ever given. If this is a prosecution by the attorney-general, those who represent him, though not usually counsel for the crown, have the right to reply." (3.) Under our state government he is an executive officer and classed as such in the revised statutes (*R. S.*, 96, § 1); which fact, although it can not be construed into a definition of his power, is still significant as indicating the nature of his office. (a.) The rule which forbids the delegation of powers by an official, applies only to judicial and ministerial—not to executive officers. (7 *Bacon Abr.*, 317, "Offices and Officers;" *State v. City of Buffalo*, 2 *Hill*, 438). (b.) A further illustration of the distinction may be gleaned from a reference to the other executive officers, named in the same statute with the attorney-general: *e. g.*, the doorkeeper of the executive chamber, who might with as much propriety be held unable to appoint a deputy, even temporarily. (4.) Observe, that the statutes against bribery and duelling, specifically require (1 *Rev. Stat.*, 180, §§ 8, 9) that the attorney-general shall "attend in person" to prosecute; while in the preceding sections there is no such personal requisition. (5.) But the statute (1 *Laws 1847*, *ch.* 288, § 1; 3 *Edm. Stat. at Large*, 37) authorizes him to appoint a deputy. True, this act looks more to providing for the salary of the deputy than to his powers; but it is still valuable as recognizing the fact that the office is one the powers of which may be deputed. (6.) So, he is authorized by

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another statute (*Laws of 1849, ch. 357, § 2*) to retain counsel in prosecuting and defending suits in the supreme court, in which the people are a party, or are interested; but this act also looks more to the compensation of such counsel than to their duties. Indeed, even during the colonial government of this state, the attorney-general appeared with counsel (2 *Jour. Leg. Council*, 26; see also *Zenger's case*, 12 *How. St. Tr., supra*), independent of any statute authorizing their retainer. (7.) The letter of authorization is sufficient. It is not necessary that the cases should be actually pending or specifically named. The authority is not a general one to commence proceedings, but to prosecute when commenced. Hence, the case of *Board of Excise v. Sackrider* (35 *N. Y. R.*, 154) does not apply. (8.) The attorney-general and the district attorney, in making this appointment, simply furthered the will and intention of the people of this state. (a.) The people created this society as a special corporation, "to enforce all laws which are now or may hereafter be enacted for the protection of dumb animals." (1 *Laws of 1866, ch. 469, § 7*) (b.) They intended that the society should have every possible assistance in its humane work, and in the act cited require all the police in the state to aid it.

V. The district-attorney had an equal right to authorize Mr. Bergh to represent him in these cases. (1.) He had by statute a right to go before the grand jury and aid in examining the witnesses therein (2 *Rev. Stat.*, 725, § 33). (2.) His assistants have an equal right (*U. S. v. Reed*, 2 *Blatch. C. C.*, 455, per NELSON, J).

THE RECORDER.—In giving my action upon this proceeding, it is proper I should submit my views in writing. I am clear that it is contempt of court-at-common law for a witness or by-stander to communicate

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with the grand jury without its request; but to be a contempt under the statute, the communication must savor of the degree of contemptuous behavior committed during the sitting of the court, and directly tending to impair due respect. I think that the term behavior may cover the writing and delivery to the grand jury of a contemptuous and insulting letter. It is clear from the elementary writers, and from what the court of appeals imply in the Hackley case (24 N. Y., 78), that the grand-jury-room is an enlargement of the court-room, and part of the court sitting. Handing to the petit jury a letter containing remarks upon the case pending before them has been at *nisi prius* adjudged a contempt; the jury, for convenience, being outside of the court-room proper, it is true, but legally and technically, nevertheless, a part of the court sitting; and both the grand and petit jury-rooms were merely extensions of the court apartment, and are under equal jurisdiction.

The insinuation conveyed by this expression in the letter of Mr. Bergh, "as in the present instance they have escaped through means which I forbear to mention," addressed to any officer of the court during its sitting, could not be made worse for contemptuous and insolent behavior tending to impair respect. At the commencement of the last October term of this court, I charged the then grand jury as follows:

"The minutes of some grand juries have in the past distinctly shown traces as well as evidences of considerations and of reconsiderations and preferences, which can only be explained upon the belief that grand juries have yielded to lobby pressure, either in finally finding or finally dismissing bills of indictment. The grand juror who suffers himself to be even impliedly approached upon subject-matters pending before the body of which he is a sworn member, not only violates his oath but transcends the common law

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that forbids such approaches either in the act of the citizen or in the consent of the juror. Should it so happen during the present term of your duty as grand jurors that any person whomsoever (except the district-attorney, who, when desired, becomes your legal adviser), shall approach either of you and seek to confer, or endeavor to influence your action for or against the prosecution of any complaint pending before you, then it will become your duty to promptly communicate the fact to this court, in order that the person so offending may be summarily dealt with. The district-attorney has done all in his power to destroy the opportunities for this lobby influence with the grand inquest, but if jurors allow letters to be delivered to them by accused persons, accusers, or their counsel, or visits to be made to them at their places of business, or houses, by friends of suspected persons, they can not obviate such a scandal or frustrate the wrong intended.

It will thus be perceived that the considerations growing out of the action of Mr. Bergh are not new and were not suggested by the attitude taken by the late grand jury; and I had determined to reprehend the first instance of grand jury lobbying or outside interference which should be submitted to my consideration. But Mr. Bergh shows that he is, for the purposes of his society, both a deputy attorney-general and an assistant district-attorney by written appointments from Messrs. Pratt and Phelps. Mr. Bergh, in his affidavit swears: "Such letter was sent and intended to be sent, as an official communication in the interests of the people of this State, which deponent then honestly believed he was then representing, and and not to subserve any private or personal interest, or to gratify any individual spleen or malice; and deponent firmly and conscientiously believed at the time that he was only doing his duty, and that his course

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was entirely justifiable under the authority derived from the attorney-general and district-attorney referred to.

In the matter of Strong, in this court half a century since, it was held that the act of sending a scurrilous letter to the grand jury ought not to be considered a contempt, unless it clearly appeared that it was designed to interrupt the administration of justice. The supreme court has held (*Weeks v. Smith*, 3 *Abb. Pr.*, 211) that if the alleged contempt be capable of a construction consistent with innocence of the party of any intentional disrespect, there is no legal contempt. It would seem that Mr. Bergh's explanation that he was acting as the agent of the prosecuting officers is consistent with innocence. The court, however, trusts it may be pardoned for observing that the representative of the attorney-general and the district-attorney owes it to those gentlemen, if not to himself, to infuse into his oral or written intercourse with grand juries, rather the *suaviter in modo* than the *fortiter in re*; and to remember an old saying, "that he who impugns motives, should always rigidly examine his own."

Let the rule be discharged, and Mr. Henry Bergh stands exonerated, under his explanatory oath, from any intentional contempt.

Kade v. Lauber.

KADE *against* LAUBER.

*Supreme Court, First Department, First District ;
Special Term, January, 1875.*

DOWER.—DIVORCE.

A woman divorced *a vinculo matrimonii*, on the ground of the adultery of her husband, is not entitled to dower in lands of which he became seized after, and of which he was not seized before, the divorce; since under the statute granting such divorces for that cause (2 *Rev. Stat.*, 142; amended by *L.* 1862, p. 446, ch. 246), the decree of divorce puts an end to the marriage relation from the time it is pronounced.*

Otherwise, however, as to lands of which the husband was seized during the coverture, and before the divorce.

This action was brought to recover dower.

Plaintiff was married to Charles Kade in the year 1857. The marriage was dissolved by judgment in an action brought by the plaintiff herein against her husband.

The divorce was *a vinculo matrimonii*. The lands, out of which the plaintiff claims to be endowed, were acquired by her former husband in 1868, and after the parties had been divorced. In 1869, Kade sold and conveyed the land to the defendant, who is still the owner. Plaintiff did not join in the conveyance. Kade died in 1873.

* Where a divorce for the wife's adultery is relied on as a bar of dower, a formal judgment is requisite, under the statute. A finding of adultery, as a fact, without the entry of a decree against her, thereon, is not enough (*Pitts v. Pitts*, 14 *Abb. Pr. N. S.*, 97; affirming 13 *Id.*, 272).

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VAN VORST, J. [after stating the facts].—The Revised Statutes provide that a widow shall be endowed of the third part of all the lands, whereof her husband was seized of an estate of inheritance, at any time during the marriage (1 *Rev. Stat.*, 740, § 1 ; and of the 5th ed., vol. 3, p. 31, § 1). In order, therefore, to entitle the widow to an estate in dower, there must have been seizin in the husband during the marriage. *Wait v. Wait* (4 *N. Y.*, 95) was a new case. It was there first decided that a divorce, dissolving the marriage contract on the ground of the adultery of the husband, does not deprive the wife of her right of dower in his real estate. But in that case the husband had been seized before the divorce, of the real estate, in which the widow was held to be endowed. In that case the court noticed the distinction between a divorce at common law, which declared the marriage void *ab initio*, and that under the statute, which was a dissolution of the marriage relation for causes happening subsequent to the marriage, and which still left to the wife, when the complainant, her rights in her husband's lands secured by the marriage. Such acquired interest and rights were not divested or lost by the dissolution of the marriage contract. But that case decides no more than that the wife is endowed of all the lands of which her husband was seized at any time during coverture.

The decree of divorce, under the statute, puts an end to the marriage. The marriage contract is dissolved from and after the decree.

In *Cropsey v. Ogden* (11 *N. Y.*, 228, 234), JOHNSON, J., says, "parties once married, but whose marriage has been dissolved, can in no legal sense be said to be husband and wife." Where the husband is the guilty party, the former wife may marry again, and acquire rights incident to such new relation. It is true that, under such circumstances, the former husband can

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not marry again until the death of his former wife ; but such prohibition is a penalty for his infidelity to his former marital vows and obligations, and a breach of the prohibition is a misdemeanor, but is not within the penalty of the act against bigamy.

“The restraint of the defendant as to a second marriage, arises not out of the marriage contract, or from any continuing obligation to his former wife, but exclusively from the positive prohibition of the statute” (People v. Hovey, 5 Barb., 117, 119).

When the case of Wait v. Wait (above cited) was in the supreme court (4 Barb., 192), in which a majority of the judges held that a woman, who has obtained a decree of divorce *a vinculo matrimonii*, for the adultery of the husband, is not, after his death, entitled to dower in his real estate, Judge WILLARD, who dissented, in the opening of his opinion (p. 210) says,—“the main question raised by the bill of exceptions is, whether the complainant is entitled to dower in lands whereof her husband was seized during the coverture, prior to the divorce for adultery committed by him, she being the innocent, and he the guilty, party” (Will. on Real Estate, 71; Burr v. Burr, 10 Paige, 20, 25, 26).

The marriage, therefore, between the parties having been dissolved, and the relation of husband and wife having ceased to exist, prior to the seizin in Kade of the land in question, the plaintiff has no estate in dower therein.

And there should be judgment for the defendant, with costs.

MORGAN *against* MORGAN.

*New York, Common Pleas; Special Term, November,
1874.*

EVIDENCE.—WITNESS.—CORPORATIONS.—DISCOVERY.
—CONTEMPT.

Even where a corporation is a party to the action, the production of its books can not be enforced by subpoena *duces tecum*, served on its officers, but only by discovery under 2 *Rev. Stat.*, 199—which provides for discovery by a party, under an order of the supreme court, in cases in which discovery may be proper—or under section 388 of the Code of Procedure—which authorizes the court before which an action is pending, or any judge or justice thereof, upon notice, to order either party to give to the other an inspection, or copy, or permission to take a copy, of any books, &c., in his possession, or under his control, containing evidence relating to the merits of the action or to the defense therein—both of which make the granting of the discovery, to be in the discretion of the court or judge applied to.*

Where a corporation is not a party to the action, no power of enforcing an examination or production of its books and papers is afforded on a trial between other parties; nor can its agents or officers, in their individual capacities be compelled to discover or produce the books of a corporation, over which they have not the absolute control and right of disposition at their own will and discretion.

It is defense to a common-law action against a witness, and to a proceeding to punish him for contempt, for neglecting to attend in obedience to the process of subpoena served upon him, that he knows nothing material to the issue; or if it was a subpoena *duces tecum*, that he has not any document, such as he is called upon to produce, material and necessary as evidence tending to prove the case of the party requiring his attendance.

* As to mode of enforcing an order of discovery, see amended supreme court rule 20, of 1875.

Morgan v. Morgan.

William F. Morgan brought this action for an absolute divorce from his wife Caroline L. Morgan, on the ground of her alleged adultery.

The action was referred to a referee.

One Sarah Tyndal testified before the referee, that defendant's mother, Mrs. Lyons, as her agent, brought a new-born infant to the foundling asylum of the sisters of charity in the city of New York, on or about June 15, 1872; that witness was at the asylum at the time; and that Mrs. Lyons left the infant with the sisters of charity. The witness further testified that defendant had interviews with her, in which defendant admitted sending the infant to the asylum by her mother, and made statements explanatory of the manner in which the child came to her, and the reasons which induced her to send it to the asylum.

In furtherance of the investigation into the paternity of the child, which is alleged to be the fruit of an illicit intercourse between the defendant and a paramour, the referee issued subpoenas *duces tecum* requiring sisters M. Irene and Aloyse, chief officers of the asylum corporation, to attend before the referee, and produce the book or books of the asylum containing entries of the disposition of infants, the reports of the person or persons appointed to inspect such infants, and the letters, if there be any, written in respect to an infant left at said asylum by defendant's mother as above stated. Neither the asylum nor its officers are parties to the action.

The subpoenas were duly served.

The proposed witnesses, acting under the advice of counsel, not having appeared, and declining to appear unless ordered by the court so to do, a motion for an order compelling them to produce the books or sworn copies of entries therein, or, in default thereof, for their attachment for contempt, was made before LOEW, J. This motion was based on an affidavit by the plaintiff

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that the books of the foundling asylum contain evidence material to the issues of this cause, and that, after consulting his counsel, he can not safely proceed with the trial without it; and also upon an affidavit by Sarah Tyndal that it is customary at such institutions, "when a well-dressed person (such as was defendant's mother) was seen by one of the sisters to bring an infant, and leave it in the cradle of said institution, for the person to be interrogated by the sister as to the circumstance of the parentage of the child;" . . . "that the deponent believes that was done in the present case;" . . . "that it was the rule of the institution that the names of infants, and circumstances of interest to the infant and its parents, leading to identification or otherwise, should be entered in a certain book kept for such purpose, and when an infant had no name given to it, to the knowledge of the sisters, then the sisters gave the infant a name," &c., and that she heard some conversation between Mrs. Lyons and one of the officers, on the occasion of her leaving the child.

LOEW, J., after hearing counsel, decided that the officers of a corporation could be compelled to produce the corporate books and papers for the purpose for which these were now desired, and that this court had frequently compelled them to do so. The justice further held that the affidavits on which the motion was made should specify the particular books required, and gave the counsel for the plaintiff leave to renew his motion on new and more specific affidavits.

The present hearing is on the renewal of the motion.

George H. Hart, for plaintiff, in support of the motion.—The provisions of the Revised Statutes (2 R. S., 199), and of the Code of Procedure (§ 388), do not apply, since the proposed witnesses are not parties to

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the action, so that the ancient practice obtains and governs this case (*Gould v. McCarty*, 11 *N. Y.*, 575; *Follett v. Weed*, 1 *Code R.*, 65; *Davis v. Dunham*, 13 *How. Pr.*, 425, 427). The Revised Statutes, moreover, do not apply to the production of books on the trial, but only confer a right of inspection (*Lefferts v. Brampton*, 24 *How. Pr.*, 257). To be excused, the witness must (1) belong to a privileged class, or (2) be physically incapable to comply with the terms of the subpoena; either of which exceptions are the proposed witnesses within. The doctrine of *La Farge v. La Farge Ins. Co.* (14 *How. Pr.*, 26) applies only when the officers of the corporation are parties to the suit, when a discovery of the corporate books is demanded. (2 *R. S.* 199, § 21). The witnesses subpoenaed were bound to attend (2 *R. S.*, 400); and to produce the papers called for (*Bonesteel v. Lynde*, 8 *How. Pr.*, 226; *Aff'd Id.*, 352; *Garighe v. Losche*, 6 *Abb. Pr.*, 284, *note*; *People v. Dyckman*, 24 *How. Pr.*, 222; *Brett v. Bucknam*, 32 *Barb.*, 655; *Amey v. Long*, 9 *East*, 473). The subpoena was proper (*Aikin v. Martin*, 11 *Paige*, 499). A witness disobeying the *duces tecum* clause, though otherwise obeying the subpoena, is liable in damages to the party aggrieved (*Amey v. Long*, 1 *Camp. N. P.*, 14; *Lane v. Cole* (12 *Barb.*, 680); and it is not necessary to show damage (*Id.*; 2 *Waite's Pr.*, 727; and cases cited). The evidence sought for is material (see plaintiff's affidavit), though if it were not, the objection could not be taken on this application (*Central Nat'l. Bank v. White*, 37 *N. Y. Super. Ct.* (5 *Jones & S.*), 297). The materiality has not been denied by affidavit, and so must be taken to be admitted (*Lefferts v. Brampton*, 24 *How. Pr.*, 257, 261). The representations made by Mrs. Lyons, to the sisters on leaving the child, are evidence against the defendant (*Kasson v. Mills*, 8 *How. Pr.*, 377; *Hunter v. Hudson River Iron Co.*, 20 *Barb.*, 493); and are

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parts of the *res gestæ* (Budlong v. Van Nostrand, 24 Barb., 25; Thalhimer v. Brinckerhoff, 4 Wend., 394). It is no answer to say that they are confidential, if they are not privileged (People v. Sheriff, 7 Abb. Pr., 96). The description of the entries required, is sufficient (Low v. Graydon, 14 Abb. Pr., 443; Thompson v. Erie R. Co., 9 Abb. Pr., N. S. 216, 225).

John E. Develin, for the Foundling Asylum, and the sisters, M. Irene and Aloyse. The entries, if any, would be of Mrs. Lyons' representations, and as to these, she should herself be called. The entries are mere hearsay, and though proper to refresh her memory by, would not be admissible even in her impeachment. The affidavits do not allege that the defendant is the mother of the child. The nature and materiality of the entries should be specifically set forth in the affidavits (Walker v. Granite Bank, 44 Barb., 39; Cassard v. Hinman, 6 Duer., 695). But even if the affidavits were positive as to the entries having been made, and specific as to their nature and materiality, the motion should not be granted. The sisters, M. Irene and Aloyse, are officers of a corporation, and only have the care and custody of the books as such (Bank of Utica v. Hillard, 5 Cow., 153; La Farge v. La Farge Ins. Co., 14 How Pr., 26). Neither can say "these books are my books," and this is the best of their obligation to produce them (*Ang. & Ames on Corp.*, p. 608, ch. 18).

ROBINSON, J. [after stating the facts.]—This motion is to compel compliance with plaintiff's demands, and in my opinion it should be denied. 1. Even in case of an action in which a corporation is a party, the production of its books can not be enforced by subpœna *duces tecum* served on its officers; it can only be effected by way of discovery under the provisions of

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the Revised Statutes (2 R. S. 199), or of § 388 of the Code (*La Farge v. La Farge Ins. Co.*, 14 *How. Pr.*, 26 ; *Opdyke v. Marble*, 44 *Barb.* 64) ; and the exercise of this power is left to the discretion of the courts.

As to the books of a corporation not a party to the action, no such power of enforcing an examination or production of them on a trial between other parties is afforded ; nor can its agents or officers in their individual capacities be compelled to discover or produce the books of a corporation over which they have not the absolute control and right of disposition at their own will and discretion (*Opdyke v. Marble*, *supra*).

2nd. It is an answer as well to a common-law action against a witness as in proceeding to punish him for contempt for neglecting to attend in obedience to the process of subpœna, served upon him, that he knows nothing material to the issue, or if it was a subpœna *duces tecum*, that he has not any document such as he is called upon to produce, material and necessary as evidence, tending to prove the case of the party requiring his attendance (*Courtney v. Baker*, 3 *Den.*, 27, and cases cited pp. 30, 31).

The case stated by the plaintiff affords at most the occasion for a mere fishing inquiry, that might possibly afford threads or clues for other inquiries, leading, perhaps, to elicit information as to some fact material to the case ; but what the defendant's mother then communicated, or what was written down in the books of the corporation were in no respects *res gestæ* as between the parties to this action, nor of any greater efficacy as evidence of any fact, than if it had then been declared and so entered on the books of the Foundling Asylum, that the cause for the consignment of the infant to its charge was the murder of one of its parents by the other.

As *res gestæ* they had no relation to the incipency of its gestation, or act of adultery charged, and there-

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fore in no way tended to prove the commission of any adultery on that occasion.

The motion to compel the witnesses to produce the books of the corporation, or of any copies of entries therein, is denied, with ten dollars costs.

THE VILLAGE OF NORTH TONAWANDA *against*
THE WESTERN TRANSPORTATION
COMPANY.

Buffalo Superior Court, General Term, October, 1873.

FORM OF TAX.—VILLAGE CORPORATION.

A village corporation can not by combining several unconnected objects in the plan of a building vote a single and entire tax for the purpose.

Thus a village corporation, being authorized by a special statute to lay a tax for building an engine-house, and by another statute to lay a tax for building a council chamber and police station, both taxes to be laid in the manner prescribed in the general village corporation act, can not combine the objects, and give notice and take the vote on the proposal to tax for an entire sum.

Exceptions.

A. P. Nichols, for the plaintiff.

Geo. B. Hibburd, for the defendant.

BY THE COURT.—SMITH, J.—This case comes before us on exceptions taken at the trial before a judge of

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this court without a jury, which were ordered to be heard in the first instance at the general term.

The action is to recover a tax alleged to have been duly and legally assessed on defendant's property, the plaintiff being a village corporation created under chap. 247 of the laws of 1847, and the defendant a corporation located in said village.

On the trial the plaintiff proved by the book of records of its corporate proceedings that February 6, 1872, the village trustees passed a resolution that at the annual village election to be held March 5th, 1872, moneys be raised by tax to the amount and for the purposes following, viz.: "Cross-walks \$50.00 ; clerks' fees, \$50.00 ; assessors' fees, \$15.00 ; office rent \$25.00 ; stationery, \$5.00 ; for engine-house, council room, and watch house, \$4,000.00 ; contingent fund, \$75.00 ;" in all \$4,220.00. Plaintiff also proved that in the notice of said annual election given pursuant to said act, it was stated that the electors would be requested to vote at such election to raise by tax the sum of \$4,220.00, and specified the amount and objects of the tax and the sum required for each object in the same words used in said resolution of the trustees, except that in the notice the item of \$4,000.00 was stated to be "for engine-house and council room," instead of for "engine-house, council room, and watch house," as stated in the resolution. Plaintiff having proved that the annual election was held on the day last named, offered to prove by parol that at such election the electors adopted a resolution to raise by tax the said sum of \$4,220.00, specifying the objects and the sum required for each object in the same identical language used in the notice of the election, and that the final vote in respect to each sum was taken separately. The parol proof was objected to by defendant on the ground that the plaintiff's book of records already in evidence contained entries showing the proceedings of

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said election kept by plaintiff's clerk, in which the entry in respect to said tax, and the only entry relating to it, was in these words, viz.: "The tax of \$4,220.00 was voted to be raised by a vote of thirty-six to fourteen;" that said book of records was the only evidence by which the facts could be proved; that the records could not be contradicted or varied by parol testimony, and that as the assessors could proceed to assess the tax only upon a certified copy of the resolution adopted by the meeting, the record or resolution could not be contradicted or varied by parol. The court excluded the parol testimony offered, and plaintiff excepted, and then gave in evidence plaintiff's records, showing the proceedings and vote upon said tax at said election as above stated, and offered to prove by parol the same facts as before, not to contradict the records but as supplementary thereto, to which defendant objected on the same grounds as before; the court sustained the objection and the plaintiff excepted, and then offered to prove by parol that plaintiff's clerk in making the entry in the records in respect to the vote at the election upon the taxes to be raised as given in evidence, made a clerical error, and that entry should read, and was in fact intended to be entered by him so as to read as follows: "The tax of \$4,000.00, was voted to be raised by a vote of thirty-six to fourteen, the other items of taxes having been voted unanimously." The defendant objected to such evidence, on the same grounds as before; the plaintiff excepted, and offering no further proof the court decided that the complaint must be dismissed, to which plaintiff excepted.

This action being for the collection of a tax, the plaintiff in order to recover must show a strict compliance with the provisions of the statute under which the tax was levied (*Sharp v. Speir*, 4 *Hill* 76; *Sharp v. Johnson*, *idem* 92).

That statute provides that no tax shall be voted to

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be raised at any election or meeting of the electors, unless the notice required by the act to be given, shall specify the amount and objects of such tax, and the specific sum required, or proposed to be raised for each object; also that every resolution adopted at every such election or meeting directing any tax to be raised, shall distinctly specify the objects for which such tax shall be directed to be raised, and the sum to be applied to each of such objects; otherwise such resolution shall be absolutely void. And further that any sum specified in any such notice and proposed to be raised by tax for any specific object may be reduced, but shall not to be increased before the final vote in respect to raising the same; that the final vote in respect to raising every such specific sum shall be taken separately; that every proposition to raise any such specific sum shall be deemed a separate and distinct resolution in the proceedings thereon at such meeting, and shall be in form a distinct and separate resolution, and that every vote to raise any sum of money by tax in such village shall be absolutely void if not taken as provided by this statute, chap. 426, Laws 1847, secs. 29, 30, 31.

The objects of these provisions are plain. They were intended to notify the electors before the day of election, of each specific object for which the trustees propose to levy a tax, and how much it is proposed to raise for each object; and to enable each elector to vote separately for or against each object specified, and for or against the amount proposed to be raised for each object.

In the case before us, neither the resolution of the trustees fixing the amount of taxes to be raised at the plaintiff's annual village election in 1872, nor the notice of that election given in pursuance of the resolution, nor the vote taken at the election, even if taken in the form claimed by plaintiff and offered to be proved by parol, was a compliance with the statute.

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By section 28, sub-division 4 of the act above referred to the plaintiff was empowered to levy taxes for the purpose of procuring the necessary ground and erecting an engine-house for each fire-engine owned by the village. In 1871, the legislature empowered the plaintiff to "raise a tax for the purpose of building a council-room and police station for the use of the village, such tax to be raised at the annual election, and in the manner, and as by law of said village other taxes are now raised" (*Laws* 1871, vol. 1, p. 1150). I think it clear that this act contemplates the erection of one building for a council-room and police station, and such building is therefore one object for which a tax may be raised under the general act. Certainly the plaintiff can not complain of this construction, for it is that most favorable to it. But there is no authority in either act for the village to erect one building for an engine-house, council-room, and police station. At all events, there is no authority to raise by tax one sum to be expended in a building to be used as an engine-house, and as a council-room and police station. There is no necessary connection between these different objects, and they are, within the meaning of the statute, wholly distinct and separate. An elector might well be in favor of the purchase of the necessary ground, and the erection thereon of an engine-house, and yet be wholly opposed to the building of a council-room and police station. Each elector had a right to vote on the question of building an engine-house, and of the amount of the tax to be raised for that specific purpose, wholly disconnected from any other proposition, and to reason with and canvass his fellow-electors as to that object, single and alone; to have every other elector vote on that distinct proposition, separate from all others, and to have the result of the vote entered in the records of the election on that proposition alone; and the electors had a right to have due public notice given,

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as required by the act, of the specific sum to be raised for the engine-house. The same remarks are true, on the other hand, in respect to a council-room and police station. Each elector had a right to have notice of the amount of the tax proposed to be raised for that specific object, to vote himself and have every other elector vote for or against that object alone, and upon the amount of tax to be raised for that specific object, and have a separate record made of the vote on that proposition.

It is plain, then, I repeat, that in the case before us, the requirements of the act have not been complied with. The resolution of the board of trustees authorizing the giving of the notice of the election required by section 29, was to raise by tax four thousand dollars "for engine-house, council-room, and watch-house." The notice of the election stated that the electors would be requested to vote to raise by tax four thousand dollars, "for engine-house and council-room." The vote on the day of election was, according to the records given in evidence, to raise four thousand two hundred and twenty dollars by tax for all the eight objects specified in the notice, no distinct vote being certified upon any specific sum or object, and even the vote plaintiff proposed to prove by parol was to raise the tax of four thousand dollars, for engine-house and council-room.

The resolution, notice of the election, and the vote taken at the election to raise the tax for which this action was brought, were therefore not in the form and manner provided by the statute, but in a form and manner essentially different, so as to defeat the wholesome restrictions imposed by the statute, and deprive the electors of their rights under it, and were in the language of that statute "absolutely void."

There are minor questions in the case which I have

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not deemed it necessary to consider, as the point decided is fatal to the action.

The exceptions are overruled, and final judgment must be entered for the defendant, with costs.

MORAN *against* BOGERT.

*Supreme Court, Second Department, Second District,
General Term, February, 1875.*

ARBITRATION.—EVIDENCE.—BANKRUPTCY.

Where the services rendered to an estate extended over a space of time prior as well as subsequent to the petition that the estate be declared bankrupt, the value of that portion of the services rendered prior to the commencement of the bankruptcy proceedings can not be set off in a suit by the assignee in bankruptcy, though the value of those rendered subsequent thereto may be.

Where an arbitrator determined the question submitted to him in an informal manner, and without hearing a party, or appointing a time for a hearing, the arbitrator's decision is not binding on the party, and he may prove his claim anew.

Where the referee in an action between the parties to the arbitrament, adopts the amount of the award therein as the reasonable value of a claim set up as a counter-claim disregarding the evidence before him, which all tended to show a higher value,—*Held*, that a new trial should be had, unless plaintiffs would consent that the amount of the lesser of the two estimates of the value put in evidence should be assumed as that to be set off to the defendant under the counter-claim.

James H. Moran and Marcus L. Cobb, as assignees in bankruptcy of Matthew D. Bogert, brought this action in this court against Catharine Bogert, to recover

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the balance due on the price of certain horses, &c., sold March 8, 1871, to defendant by plaintiffs, and for interest on such balance.

Matthew D. Bogert had made an assignment for benefit of creditors on March 5, 1870, the assignee under which had left the chattels afterward sold as above, in the possession of the defendant, and they remained in her possession up to the time of the sale.

The petition in bankruptcy was filed August 11, 1870.

Defendant, after the sale, preferred a claim for keeping the animals from March 5, 1870, until the time of the sale, as an offset against the price, which was nine hundred and fifty-four dollars.

Upon objection that the only offset the assignee could allow, was for the time since the petition in bankruptcy, a bill for five hundred and forty $\frac{50}{100}$ dollars for the keep of the animals from August 11, 1870, was presented.

One hundred and fifty-four dollars of the purchase price was paid in cash and the balance, eight hundred dollars, was allowed to remain unpaid until the adjustment of the offset claim, the allowance of which was submitted to the register in bankruptcy. The register decided that two hundred and fifty dollars offset should be allowed, but without hearing the claimant or appointing a time for a hearing.

After the sale a decree was made by the United States District Court in bankruptcy setting aside the assignment for the benefit of creditors, and adjudging the chattels in question to be a part of the bankrupt's estate, but allowing the assignee for benefit of creditors the amount of the expenses he had been subjected to in his charge thereof.

The damages laid in the complaint were five hundred and fifty dollars, the balance due on the sale after deducting the amount of the register's award.

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The defendant set up a counter-claim for eight hundred and eighty-six $\frac{40}{100}$ dollars, for the keep of the animals from March 5, 1870, to the time of sale, and adding thereto the amount of the portion of the price already paid, claimed the excess of this sum total over the whole purchase price as due to her.

The plaintiffs in reply, set up the award of the register as binding on the defendant.

The cause was referred.

The only witnesses as to the value of the keep, were two who testified for the defendant. The testimony of one of them made the value from the date of the petition in bankruptcy to the date of the sale, four hundred and nine $\frac{50}{100}$ dollars. That of the other witness indicated a still larger sum.

The referee found for the plaintiff in the sum of five hundred and fifty dollars, with interest thereon from the date of the sale, holding that the defendant was bound by the award of the register, and also finding that the keep of the animals was reasonably worth the sum of two hundred and fifty dollars.

Defendant's counsel, on the settlement of the case, moved that the referee be ordered to find specifically on the cost of keeping each horse per month through the summer; each horse per month through the winter; each cow per month through the summer; each cow per month through the winter, &c., which motion was denied.

The defendant's counsel excepted to the report, and appealed from the judgment entered thereon.

Jam^{es} A. Seaman, for the defendant appellant.

The referee should have found specifically on the questions of fact, as requested (*Snook v. Fries*, 19 *Barb.*, 313; *Hulce v. Sherman*, 13 *How. Pr.*, 411; *Honlahan v. Sackett's Harbor R. R. Co.*, 24 *How. Pr.*, 155; *Van Slyke v. Hyatt*, 46 *N. Y.*, 259; *Fabbri v. Kalbfleisch*, 52

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Id. 28 ; Rogers v. Wheeler, 52 *Id.*, 262, 268 ; Quincey v. Young, 53 *Id.*, 504). It was error for the referee to adopt the award of the register, since as register he could not make a decision binding on the defendant. If the register acted as arbitrator the award was irregular for not hearing, or giving an opportunity to produce testimony for the defendant (*Elmendorf v. Harris*, 23 *Wend.*, 628 ; *Jordan v. Hyatt*, 3 *Barb.*, 275 ; *Knowlton v. Mickles*, 29 *Barb.*, 465 ; *Garvey v. Carey*, 4 *Abb. Pr. (N. S.)*, 159 ; S. C., 35 *How. Pr.*, 282 ; 7 *Robt.*, 286, and cases cited in these). The referee's finding as to the reasonable value of keeping the animals was not in accordance with the evidence.

Abbott Brothers, for the plaintiffs respondent.

No sum is due to the defendant from the plaintiffs for the keeping of the animals prior to the date of the petition in bankruptcy. Moreover such claim was withdrawn and waived. The referee not only adopts the award of the register, but also finds independently that the reasonable worth of the keep of the animals was two hundred and fifty dollars.

The order of the court denying defendant's motion to find specifically on his requests was proper.

BY THE COURT.*—TAPPEN J.—This is an appeal from a judgment entered in Westchester county on the report of a referee ; the plaintiffs as assignees in bankruptcy sold certain live-stock of the bankrupt which was bought by the defendant, and this action is brought for a balance of the purchase money ; previous to the assignees taking title to the property of the bankrupt, the defendant had possession of the stock on keep ; her bill for this keep, is a debt of the bankrupt, and can not be set off against the claim in suit.

* Present, BARNARD, P. J., TAPPEN, J. (DONOHUE, J., sat at the argument, but was not present when the opinion was handed down.)

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The assignees took title on August 11, 1870 ; there was delay arising out of adverse litigations, and the live stock in question was left in defendant's possession until the sale on March 8, 1871.

She is entitled to recover for the value of the keep during this period, because it was an expense incurred for the benefit of the estate. The plaintiff proved at the trial that the defendant's account had been left by agreement to the register in bankruptcy for adjustment, and that he determined that two hundred and fifty dollars would be a proper allowance, and the referee has deducted that sum from the purchase price of the cattle. Any such agreement would constitute a common-law arbitration, and would be binding as to the subject-matter arbitrated, but it appears that the arbitrator in an informal manner, and without hearing the claimant or appointing a time for a hearing, determined the claim. This mode of deciding or arbitrating the matter being irregular is not binding on the defendant, and she may prove her claim anew.

The testimony as to the value of such keep was conflicting ; some witnesses adopted a higher, and some a lower rate ; the referee rejected these rates, and adopted the sum of two hundred and fifty dollars for the reasons stated. There is testimony showing such value for the period stated to be four hundred and nine dollars and fifty cents. Some witnesses state a larger sum. If the plaintiff shall file the proper consent, allowing the difference of one hundred and fifty-nine dollars, the judgment may be reduced, and affirmed as reduced, and without costs to either party. Otherwise a new trial is ordered, costs to abide event.

WILLMONT *against* MESEROLE.

*New York Superior Court, Special Term, January,
1875.*

SECURITY FOR COSTS.—ATTORNEY.

Under 2 *R. S.* 620, § 7, an attorney for a non-resident plaintiff is liable for costs to an amount not exceeding one hundred dollars, and such liability can be enforced summarily by order.

Though the general rules of court (rule 8) prohibits an attorney-at-law, though he is not the attorney of record, from becoming security for a party; still, if without objection an attorney does become surety for costs, he can not be proceeded against summarily as an officer of the court, but must be pursued in the same manner as any other surety.

The general power over attorneys is exclusive in the supreme court; the power of the New York superior court extends only to attorneys appearing in causes in that court, and for their conduct in those causes.

Alfred H. Willmont, a non-resident, brought this action in this court against Cornelius M. Meserole and others.

The defendant named obtained an order requiring the plaintiff to file security for costs in the sum of five hundred dollars.

Within the time limited by the order, the plaintiff caused a bond to be executed by N. McGregor Steele as surety, which was conditioned that said Steele would pay all costs which might be awarded to the defendant in the action.

The defendant received a judgment for costs amounting to upwards of fourteen hundred dollars.

Upon an affidavit that Steele, the obligor, was and is

an attorney at-law (but not the attorney of record in the action), a motion was made for an order requiring Steele to pay to the defendant the said sum of five hundred dollars, the penalty of said bond.

C. M. Da Costa for the defendant, in support of the motion.

E. Hamilton for the plaintiff's surety, opposed.

MONELL, Ch. J.—This is a proceeding against Mr. Steele, as an attorney-at-law, and therefore an officer of the court, but not as the attorney of record in the action, to enforce some duty which it is claimed the law imposes upon him as such officer.

Under the statute (2 R. S., 620, § 7), an attorney prosecuting an action for a non-resident plaintiff, is liable for costs to an amount not exceeding one hundred dollars; and it is settled that such liability can be enforced summarily by order (*Jones v. Savage*, 10 Wend. 621; *Sigourney v. Waddle*, 9 Paige, 381). The attorney, however, may relieve himself of this liability, by giving the security required by the statute.

If Mr. Steele had been the attorney of record in the action, it is probable that, at least to the extent of one hundred dollars, the court where the action was brought and prosecuted to judgment might have proceeded summarily by order, directing the payment of that sum, unless his execution of the bond wholly relieved him from all other liability than such as attached to that obligation.

But Mr. Steele was not the attorney of record in this action, but only an attorney-at-law, and it is sought to reach him under the general power which courts are authorized to exercise over their officers.

Without determining whether that power is lodged exclusively in the supreme court, or whether it may not

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to the extent at least of enforcing its orders, be exercised by this court, it is sufficient for the motion that Mr. Steele has not, in my opinion, incurred any liability in this case which can be enforced in this summary manner.

There is no provision of law, that I am aware of which prohibits an attorney-at-law from becoming security for another person in any matter in which he is not acting in the capacity of attorney for such person. The general rule recognized by the courts, that attorneys can not be bail or security for their clients, was founded upon reasons of convenience, and to relieve attorneys from importunities of their clients, and clients from exorbitant exactions of their attorneys.

But I think the rule has never been extended further than to exclude attorneys from becoming security for their clients, and in some action or proceeding in which they appear upon the record as such attorney, or are acting as the attorneys, or possibly as the counsel of the person for whom they became security.

The general rule of court (rule 8), which provides that "in no case shall an attorney be surety on any undertaking," merely extends the ineligibility of attorneys to another kind of security.

But even this disqualification of attorneys was formerly confined to such securities as were not required or regulated by statute. Hence, in *Walker v. Holmes* (22 *Wend.* 614), when upon an order to file security, the attorney of record signed the bond. BRONSON, J., says: "The practice on requiring security for costs has been regulated by statute, and it is enough that the plaintiff has complied with the statute by executing a bond with a sufficient security, and the surety was justified."

The disqualification from becoming bail is general in its application, and an attorney would be rejected as bail, although he was not the attorney of the party bailed; and I am inclined to think that the disqualifi-

cation extends generally to all suretyship. Clearly the rule (rule 8), as recently amended, covers all suretyships required by law.

But if, without objection, an attorney does become surety, he incurs no other or different responsibility than legally attaches to the obligation he signs, and it seems to me that such obligation can be enforced in no other manner than if it was the obligation of a person not an attorney or officer of the court.

The disability of an attorney to become security is ground of objection, and may be sufficient to reject him ; but if he is allowed to remain without objection, it does not render the security void, nor does it raise any different liability than such as the instrument he signs would legally impose upon any other person.

In England, where the same rule in regard to bail exists, it has been held that bail by an attorney can not be treated as a nullity, but is ground of objection only (*King v. Sheriff of Surry*, 2 *East*, 181 ; *Banter v. Levy*, 1 *Chit. Rep.*, 713).

It has also been there held that an attorney is liable on his recognizance when it is entered into notwithstanding he is prohibited from becoming bail (*Harper v. Tahomden*, 1 *Chit. Rep.*, 714, note).

The rule as to bail in courts of law was never adopted in the court of chancery (*Micklethwaite v. Rhodes*, 4 *Sandf. Ch.*, 434) in respect to security required by statute, and it was held in the case just cited, that the solicitor might be surety upon a bond for costs ; and in *Ryckman v. Coleman* (13 *Abb. Pr.*, 398), the disability of attorneys was limited to bail for the appearance of the party arrested.

The general power over attorneys is, I think, confined to, or exclusive in the supreme court. It is through that court that they obtain admission, and it is by that court they can be disbarred, or reached for any general misconduct, not immediately con-

nected with actions or proceedings pending in other courts.

The power of this court extends only to attorneys who appear upon the records of this court, and are charged with misconduct in actions pending in this court; and which misconduct must relate to his office of attorney in such action. If, being an attorney, he does some act which he is disqualified from doing, but which is not done as the attorney of either party to the action, which might subject him to some liability to the parties, or either of them, he must be proceeded against in the court which, in such a case, would have exclusive jurisdiction.

The cases to which I was referred by the defendant's counsel are not opposed to the general principle which I have stated in respect to the power of courts over their officers, but they do not sustain the position that for any general misconduct any other than the supreme court can take cognizance (*In re John Percy*, 36 N. Y., 651).

I do not doubt that if this court could legally make an order requiring Mr. Steele to pay the defendant's costs, such order would, under the general powers of all courts to enforce obedience of their orders, be enforced by attachment against him.

But I have already determined that his mere signing of a bond as security, was not the act of an attorney, and therefore imposed no special or peculiar liability upon him.

If, however, by doing so he violated any rule of the court, or was guilty of any breach of professional duty, he must be called to account for such violation or breach in another tribunal.

The motion must be denied, with costs.

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HEDGES *against* BUNGAY.

*Supreme Court, Second Department, Second District,
General Term, February, 1875.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.—BOND.

Under section 3 of the act of 1860 (L. 1860, ch. 348, p. 594), which authorizes assignments for the benefit of creditors, unless the assignee's bond is approved by the county judge within thirty days after the date of the assignment, the assignee fails to take title to the assignor's estate (Applying the principle of *Juliand v. Rathbone*, 39 *N. Y.*, 369).

The fact that the county judge was absent from the county during the last six of the thirty days, and that a bond was during such absence executed and taken to the county court-room for approval, does not cure the lack of approval.

The amendment of the act of 1860 (L. 1860, ch. 348, p. 594, above) by L. 1874, ch. 600, p. 824, does not affect the rule.

Charles Hedges, Henry Drisler, Jr., and Samuel Furman, on the one part, and George W. Bungay, Jr., as assignee for the benefit of Eleazer P. Bowen's creditors, on the other part, agreed to submit the question in difference between them, which might have been the subject of a civil action, to the court at general term, under section 372 of the code of procedure.

The assignment for the benefit of Bowen's creditors was duly executed, acknowledged, and recorded under act of 1860 (*Laws* 1860, ch. 348, p. 594) and the acts amendatory thereof, on July 6, 1874.

On July 24, 1874, the said Bowen duly made and delivered to the county judge of Kings county the inventories and schedules required by said act, and the county judge upon them that he fixed the amount of the assignee's bond at thirteen hundred dollars. Said

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inventories and schedules so indorsed were duly filed with the county clerk.

On July 30, 1874, the said county judge departed from Kings county, and was continuously absent therefrom until after August 5, 1874, which was the last of the thirty days from the recording of said judgment, within which the said act prescribes that the assignee's bond shall be filed.

Previous to said August 5, 1874, the said assignee executed a bond in accordance with the provisions of said act, and for the sum ordered by the county judge, and took the bond to the county court-rooms of Kings county, to be approved by the county judge, but was unable to obtain such approval by reason of his absence, as aforesaid.

On August 5, 1874, the assignee filed the said bond without such approval in the county clerk's office.

On July 22, 1874, a judgment was obtained by the plaintiffs against Bowen in the marine court of the city of New York, and a transcript of the docket thereof was filed with the county clerk of Kings county July 24, 1874. On this last mentioned day execution thereon issued to the sheriff of Kings county, and a levy was made on personal property in the possession of said assignee and belonging to the trust estate.

On August 12, 1874, Bowen duly executed and recorded another assignment to the same assignee of the same estate, and duly filed another bond for the same amount as the previous one, and with one of the sureties on the former, and one who was not thereon, and this second bond was approved.

The plaintiffs claim title under the judgment to the personal property levied on, and the defendant lays claim to the same by virtue of the first assignment aforesaid.

Chas. H. Knox, of counsel for the plaintiffs. (*Mc-*

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Daniel, Lummis, and Souther, plaintiff's attorneys).—The first assignment was void as against the plaintiffs, because the bond was not approved according to law. The strict letter of the statute is to be adhered to (*Juliand v. Rathbone*, 39 *N. Y.*, 369). The statute is mandatory, and not directory merely (*Hardmann v. Bowen*, 39 *N. Y.*, 196; *Cook v. Kelley*, 12 *Abb. Pr.*, 35; affirmed in 14 *Id.*, 466; *People v. Supervisors of N. Y.*, 11 *Id.*, 114). It can not be assumed that the county judge would have approved the former bond, since it had a different surety from the one which he did approve.

Henry Arden, for the defendant.—The provisions of the statute of 1860 before the case of *Juliand v. Rathbone* (39 *N. Y.*, 369) were held to be directory, and not mandatory (*Hardmann v. Bowen*, 39 *N. Y.*, 199; *VanVleet v. Slauson*, 45 *Barb.*, 317; *Evans v. Chapin*, 20 *How. Pr.*, 289; *Barbour v. Everson*, 16 *Abb. Pr.*, 366; *Hardcastle v. Fisher*, 24 *Missouri*, 70; *Dallam v. Titler*, 6 *Watts & Serg.*, 323). The amendment of the act of 1860 by L. 1874, ch. 600, p. 824, changed the law as laid down in *Juliand v. Rathbone* (39 *N. Y.*, 369), and reinstated the principle adhered to in the earlier cases above, and under the law so amended the assignment was made.

BY THE COURT.*—TAPPEN, J.—This is a controversy submitted without action under section 372 of the code.

The plaintiffs had judgment, and caused levy to be made on certain property of Bowen, their judgment debtor; before this levy, Bowen had made a general assignment for the benefit of creditors to the defendant

* Present, BARNARD, P. J., TAPPEN AND TALCOTT, JJ. (DONOHUE, J., sat at the argument, but was not present when the opinion was handed down.

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under the act of 1860 (*L.* 1860, chap. 348, p. 594), but the bond of the assignee required by section 3 of that act to be approved by the county judge, and filed within thirty days, &c., had not been so approved or filed ; the reason given is that the bond was ready, but the judge was absent from the county ; the bond was filed after the thirty days without such approval. The case of *Juliand v. Rathbone* (39 *N. Y.*, 369) governs the question here presented, and controls the case. The assignee did not take the title to the assignor's estate until the bond was approved and filed, because of the peculiar language of section 3 of the act, which says that such security shall be given "before he [the assignee] shall have power or authority to sell, dispose of, or convert to the purposes of the trust, any of the assigned property." And the amendment of this act by chap. 600, Laws of 1874 (p. 824) does not affect this provision. The plaintiffs by this levy acquired a lien which was not defeated by the existing assignment, and they should have judgment on the submitted case, with costs.

DENMAN *against* JAYNE.

*Supreme Court, Second Department, Second District,
General Term, February, 1875.*

PRINCIPAL AND AGENT.—EVIDENCE.

Where a husband borrowed money to stop the foreclosure of a mortgage on his wife's separate estate, but instead of stopping it, bought in the property at the foreclosure sale, and conveyed it to his creditors in trust to repay themselves the above mentioned loan and subsequent loans on account of the property, and afterwards to hold it for his benefit, and they subsequently conveyed it according to his appointment :—*Held*, in an action by the representatives of the wife to set aside the sale, &c., that the trustees were entitled to receive from her estate the portion of the sums loaned thereon, which the wife had personally received or acknowledged to be due from her, but not the part that came into the hands of her husband only, and which she had not known of or acknowledged her liability for.

The act of a party to an action signing a pleading therein in the presence of another party,—*Held*, “a transaction between them” within the proviso of section 399 of the Code.*

Maria J. Cornell, the wife of Mark Cornell, owned a farm in Westchester county, subject to a mortgage for three thousand dollars. Mark Cornell procured from the defendants Jayne and Mercer the sum of five hundred dollars, for the alleged purpose of stopping the foreclosure of the mortgage. He, however, attended the sale thereunder, and bought the property, and assigned his contract of purchase to one Hopper, to whom the conveyance was made.

Mark Cornell then having received more money from

* See *Spicer v. Spicer*, p. 113 of this vol.

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Jayne and Mercer, procured Hopper to convey the property to them, and received from them a declaration of trust that they held the property to pay themselves five thousand dollars alleged to be due them, and for the benefit of Mark Cornell, after such payment.

Afterwards, Mark Cornell agreed to sell the farm to A. T. Stewart, and called upon Jayne and Mercer to convey it.

In June, 1871, subsequent to this sale, but before conveyance, which was in August, 1871, Maria J. Cornell brought an action against all the above named persons to prevent the consummation of the sale. A motion in her behalf for an injunction *pendente lite* was, however, denied, and the sale ordered by the court, which also directed that the purchase money be brought into court.

A reference was ordered to take proof and report what was due to the defendants Jayne and Mercer from the plaintiff Maria J. Cornell under the *declaration of trust*. That plaintiff had in her complaint admitted that the sum of five thousand dollars was due thereunder, but by amendment to the complaint this admission was subsequently withdrawn.

The original plaintiff having died, her heirs-at-law, the present plaintiffs, Ann Eliza Denham and others, were substituted as plaintiffs.

The only evidence, on the reference, that the amount due the defendants Jayne and Mercer from Maria J. Cornell, amounted to the sum of five thousand dollars, was her admission in the original complaint.

The evidence showed that the payment of the principal sum due (part of the five thousand dollars claimed by Jayne and Mercer being for interest) was made by checks, and in cash. One of the checks (for three hundred dollars) was rejected by the referee as evidence of payment to Maria J. Cornell as not indorsed by her, though payable to her order, but by Mark

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Cornell. Other checks were similarly payable and indorsed, and were allowed by the referee, as were checks payable to Mark Cornell's order direct.

A due bill of Maria J. Cornell in favor of Jayne and Mercer was proved, on which, including interest, the sum of three thousand two hundred and sixty-two dollars and seventy-seven cents is due.

There was no evidence that Mark Cornell was expressly constituted the agent of Maria J. Cornell, or that she knew he had received the checks or money.

The other facts appear in the opinion.

Miller, Peet and Opdyke, for the plaintiffs appellant.

LaRoy S. Gove, for the defendants respondent.

BY THE COURT.*—TAPPEN, J.—The defendants held certain lands in trust for Maria, the wife of Mark Cornell, and to secure to the defendants certain advances of money made by them from time to time for account of Mrs. Cornell. A reference was ordered to determine the amount of these advances, and from an order of the Kings special term, confirming the referee's report thereon, the plaintiffs appeal. The referee found four thousand seven hundred dollars due the defendants; the plaintiffs concede that the advances with interest amount to three thousand two hundred and sixty-two dollars, and dispute the balance.

Mark Cornell, the husband, seems to have received the remainder of the money; it was claimed that he was Mrs. Cornell's agent in the transaction of her business, and had dealings with the defendant in that capacity.

*Present, BARNARD, P. J., and TAPPEN, J. (DONOHUE, J., sat at the argument, but was not present when the opinion was handed down.)

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Mr. Cornell was the original plaintiff in this action, the present plaintiffs having on her decease been substituted as her representatives.

Mrs. Cornell signed and verified the first complaint in which it was set forth, that the amount due the defendants was five thousand dollars. The complaint had been prepared under the direction of the defendant, Jayne, who as a witness before the referee (Mrs. Cornell being then deceased) testified that she signed the affidavit in his presence; he also gave testimony going to show generally, that he was acquainted with her handwriting.

The first complaint had been amended, and the amended pleading did not contain the admission relied upon by the defendants. The testimony of Jayne, failed to show that he was acquainted with Mrs. Cornell's handwriting; the referee admitted the original complaint as evidence of the amount due the defendants Jayne and Mercer. The evidence of Jayne, a party to the action, that he had seen Mrs. Cornell sign it, was evidence of a transaction between them; it was not admissible under section 399 of the Code (*Resseque v. Mason*, 58 *Barb.*, 89).

We see no evidence upon which Mrs. Cornell can be charged with anything beyond the three thousand two hundred and sixty-two dollars.

All the other moneys went into her husband's hands and constituted his debt, there being no proof that he received them by her authority or for her account.

The amount found due, four thousand seven hundred dollars, should, therefore, be reduced to three thousand two hundred and sixty-two dollars, with interest, and the order modified accordingly.

KNICKERBOCKER LIFE INSURANCE COM-
PANY *against* HILL.

*Supreme Court, Second Department, Second District,
General Term, February, 1875.*

USURY.—MORTGAGE.—MECHANICS' LIEN.

The purchasers at the foreclosure sale under a mechanics' lien, which attached subsequently to the record of a mortgage of the same estate, may set up as a defense in a suit for the foreclosure of the mortgage, usury in the transaction on which the mortgage is founded.

The practice on proving bond and mortgage discussed by counsel, citing cases.

The powers of life insurance companies to make loans considered by counsel, citing the authorities.

The Knickerbocker Life Insurance Company brought this action against Charles A. Hill, Curtis L. North, Thomas Tremonger, George Tremonger, William Tremonger and others, in March, 1874, in this court, to foreclose a mortgage made by the defendant Hill, to the plaintiff, and recorded in December, 1872, as collateral security for the payment by Hill to the plaintiff of the sum of six thousand dollars on January 1, 1874, with interest thereon until paid.

The complaint in addition to the above facts alleged the guaranty by the defendant North of such payment.

The defendants Tremonger, answering, set forth that a notice of a mechanics' lien in their favor, on the premises in suit, was duly filed by them on September 6, 1873, and that they then commenced an action for the foreclosure of that lien against the defendants Hill and

See 17 C. & G. 302.

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North, in which they obtained judgment, and under the judgment bought in the interest of Hill and of North. The defendants Tremonger furthermore alleged that the transaction between the plaintiff and Hill and North was usurious, and that the mortgage was void for usury.

They also set up that the act of the company in making the loan was *ultra vires*, in that the property on which the mortgage was taken, was not worth fifty per cent. more than the sum for which it was alleged to have been taken as security.

The cause having been referred, at the trial plaintiffs put in evidence the bond and mortgage, which last named instrument had been duly acknowledged and recorded.

Defendant's counsel objected to the admission of the mortgage in evidence till the bond was duly admitted ; and to the admission of the bond before the execution thereof was proved by the attesting witness.

Objections overruled and bond and mortgage received. Defendants except. *

The defendants offered to prove that the loan was really for the sum of fifteen hundred dollars, and that at the time it was made, which was before the building on which the mechanic's lien attached was upon it, the lot was worth only seven hundred and fifty dollars, and that the value of the property mortgaged in its present state was far less than six thousand dollars. The referee refused to admit evidence to prove the defenses of usury or *ultra vires*. Defendants except.

It appeared that plaintiff was not made a party to the action to foreclose the mechanics' lien, and that the sale was made subject to prior liens as is the usual practice.

At the close of the testimony defendants' counsel moved to dismiss the complaint on the grounds :

That there was no proof of the bond.

That the property was not worth six thousand dollars, and so the contract founded on it was void.

That the lot before the building was on it was worth only seven hundred and fifty dollars, and so that the loan of even fifteen hundred dollars thereon was void.

That the mortgage was given for a usurious consideration ; and upon other grounds.

The referee denied the motion and defendants excepted.

The referee reported in favor of the plaintiff, and on this report judgment was entered.

The defendants had also excepted to report alleging among the grounds of exception, error in that the referee had refused to find what was the value of the lot of land, and what consideration was paid for the bond and mortgage on which the action was founded, and other facts to sustain the defenses of usury and *ultra vires*.

They now appeal from the judgment.

John H. Bergen and *Philip Reilly*, of counsel for the defendants appellant (*John R. Kuhn*, attorney).—The mortgage should not have been received in evidence until after proof of the bond (*Jackson v. Blodget*, 5 *Cow.*, 202 ; *Jackson v. Willard*, 4 *Johns.*, 43 ; *Langdon v. Buel*, 9 *Wend.*, 83 ; *Runyan v. Mesereau*, 11 *Johns.*, 534 ; *Jackson v. Bronson*, 19 *Id.*, 325 ; *Broom's Legal Max.*, 360 ; *Green v. Hart*, 1 *Johns.*, 580 ; *Rose v. Baker*, 13 *Barb.*, 230 ; *Parmelee v. Dann*, 23 *Id.*, 461 ; *Cooper v. Newland*, 17 *Abb. Pr.*, 342 ; *Merrit v. Bartholick*, 36 *N. Y.*, 44). The plaintiff should have called the attesting witness to prove the execution of the bond ; or have shown that such witness could not be produced, or was incapable of being examined (*Hodnett v. Smith*, 41 *How. Pr.*, 190 ; 2 *Phill Ev.*, 386, 394 ; *Cow. & Hill's Notes*, 424-428 ; *Holledeck v. Fleming*, 6 *Hill*, 303 ; *Story v. Lovett*, 1 *E. D. Smith*, 153 ; *Borst v.*

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Empie, 5 *N. Y.*, 36; 1 *Greenl. Ev.*, 572; Jackson v. Gager, 5 *Cow.*, 383, and cases cited; 1 *Selwyn's N. P.*, 561, 562). The mortgage is null and void since the contract on which it is based was *ultra vires* of the company (Collins v. Blantern, 2 *Wils.*, 347; Nickelson v. Wilson, 4 *Supm. Ct. [T. & C.]*, 105; *Broom's Com.*, 354-385; U. S. Bank v. Davis, 2 *Hill*, 451; Smith v. Strong, *Id.*, 241; Paxton v. Popham, 9 *East*, 408; *L.* 1866, p. 1132, ch. 525, § 1; *L.* 1853, p. 889, ch. 463, § 8; *L.* 1849, p. 441, ch. 308; Leavitt v. Palmer, 3 *N. Y.*, 24, and cases cited; 1 *R. S.*, 600, § 1, subd. 3; 2 *Kent's Com.*, 291, 298; 5 *Am. L. Rev.*, 272; Brady v. Mayor of N. Y., 20 *N. Y.*, 48, 49, 312; Morris v. City of Lawrence, 98 *Mass.*, 219, 221; Cowen v. Village of West Troy, 43 *Barb.*, 48; McSpedon v. Mayor, 7 *Bosw.*, 601; Donovan v. Mayor, 33 *N. Y.*, 291; Brady v. Bullard, 55 *Ill.*, 414; *Brice on Ultra Vires*, 27; Osgood v. Toplitz, 3 *Lans.*, 184; 2 *R. S.* 142, § 1; Olmsted v. Elder, 3 *N. Y.*, 144; Beatty v. Marine Ins. Co., 2 *Johns.*, 114; Hodges v. City of Buffalo, 2 *Den.*, 110; *Ang. & Ames on Corp.*, 239; Mechanics' Bank v. N. Y. & N. H. R. R. Co., 13 *N. Y.*, 618; Starin v. Town of Genoa, 23 *Id.*, 454; Gould v. Town of Sterling, *Id.*, 463; Buffett v. Troy & Boston R. R. Co., 40 *Id.*, 178; Commonwealth v. Erie & N. E. R. R. Co., 27 *Penn.*, 355; Marbury v. Madison, 1 *Cranch*, 176, per MARSHALL, C. J.; Bissell v. Michigan L. R. R. Co., 22 *N. Y.* 258, 276, per COMSTOCK, J.; Taylor v. C. & M. R. Co., 5 *Am. Law Rev.*, 276; East Anglian R. Co. v. Eastern R. Co., 5 *Id.*, 274; Buffett v. Troy & Boston R. Co., 40 *N. Y.*, 178, and *note*; Tracy v. Talmage, 14 *Id.*, 162; N. Y. & N. H. R. R. Co. v. Schuyler, 34 *Id.*, 30). The referee erred in refusing to allow proof of the defense of usury (Dix v. Van Wyck, 2 *Hill*, 522; Morris v. Floyd, 5 *Barb.*, 130; Brooks v. Avery, 4 *N. Y.* [4 *Comst.*], 225; Mole v. Savage, *Clarke Ch.*, 361; Bardwell v. Howe,

Id., 281 ; Catlin v. Gunter, 11 *N. Y.*, 368 ; Schermerhorn v. Talman, 14 *Id.*, 108 ; Bank of Salina v. Alvord, 31 *Id.*, 478 ; Bullard v. Raymor, 30 *Id.*, 200 ; Mason v. Lord, 40 *Id.*, 486 ; Thompson v. VanVechten, 27 *Id.*, 568 ; Merchants' Exchange Bank v. Com. W. Co., 49 *Id.*, 636, 639 ; Dry Dock Co. v. Am. Life Ins. Co., 3 *Id.* [3 *Comst.*], 344, 361). The issues were fixed by the pleadings and referred to be tried. It was therefore error for the referee to refuse proof of the defenses interposed (Hammon v. Terry, 3 *Lans.*, 186 ; Hunt v. Chapman, 51 *N. Y.*, 555 ; Ayers v. O'Farrell 10 *Bosw.*, 143 ; Waddell v. Darling, 51 *N. Y.* 327 ; Winterson v. Eighth Av. R. R. Co., 2 *Hill.*, 389 ; Ludington v. Taft, 10 *Barb.*, 447). The defendants are not estopped from interposing any defense (Candee v. Lord. 2 *N. Y.* [2 *Comst.*], 269, 276).

H. W. Johnson, of counsel for the plaintiff respondent (*Johnson & Cantine*, attorneys).—It is not claimed by the defendants that they performed any labor or furnished any materials before the mortgage was recorded. There is no allegation that either of the Hills or North had any interest in the property at the time the mechanics' lien was filed. The plaintiff was not made a party to the action to foreclose the lien. The property must, therefore, be sold subject to the prior incumbrance, and was in fact so sold (*L.* 1862, ch. 478, p. 951, § 12). One who has had the benefit of a contract with a corporation can not question the validity of the contract by impeaching the capacity of the corporation (*Steam Nav. Co. v. Weed*, 17 *Barb.*, 378 ; *Silver Lake Bank v. North*, 4 *J. C. R.*, 370 ; *Bissell v. Mich. So. R. R. Co.*, 22 *N. Y.*, 259, 262 ; *Parish v. Wheeler*, 22 *Id.*, 494 ; *Ang & Ames on Corp.*, § 256, note [9th ed.] *Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, 34 *Vt.* 2). The defense of usury is not available, since the defendants were not parties to the

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loan, and had no interest in the property at the time the mortgage was made (*Post v. Bank of Utica*, 7 *Hill*, 391; *Rexford v. Widger*, 2 *N. Y.* [2 *Comst.*], 131; *Chamberlain v. Dempsey*, 36 *Id.*, 144, 148; *Ohio, &c., R. R. Co. v. Kasson*, 37 *Id.*, 218). The plaintiff's counsel also relied on some of the cases cited on this point in behalf the defendants. The recital of the execution of the bond contained in the mortgage which was duly acknowledged, estopped not only the mortgagor but all claiming under him from denying the execution of the bond (*Cooper v. Newland*, 17 *Abb. Pr.*, 342; *Skinner v. Smart* [at Gen'l Term, 2nd Jud. Dist. March, 1862]; *Jackson v. Halstead*, 5 *Cow.*, 216; 1 *Cow. & Hill's Notes*, 380).

BY THE COURT.*—TAPPEN, J.—This is an appeal by certain of the defendants from a judgment entered upon the report of a referee in favor of the plaintiff in an action for the foreclosure of a mortgage.

The only questions which will be considered in this opinion, are whether the defendants Tremonger had acquired an interest in the mortgaged premises which entitles them to question the validity of the mortgage, and whether the defense of usury set up in their answer is available to them as subsequent incumbrancers or purchasers of the premises.

The complaint avers a mortgage made by the defendant Charles A. Hill, a guarantee thereof in writing by the defendant Curtis L. North, and that the defendants therein including the defendants Tremonger, who defend this action, have or claim some interest or lien in the mortgaged premises which lien or interest if any accrued subsequent to the lien of the mortgage,

* Present, BARNARD, P. J., AND TAPPEN J. (DONOHUE, J., sat at the argument, but was not present when the opinion was handed down.)

and the usual judgment of foreclosure and sale is sought.

Among other matters set up by the defendants Tremonger in their answer, is an averment, that they furnished labor and materials towards the erection of a house on the premises, that they filed a builder's lien on September 6, 1873, that they foreclosed the lien and had judgment on February 24, 1874, and a sale thereunder whereby they became the purchasers and owners of all the right, title and interest of the defendants Hill, North, &c. ; they further aver, that the mortgage in suit was usurious, and specify the usurious agreement, and ask judgment for the cancelation thereof. At the trial the referee ruled that the defendants had no right to interpose the defense of usury, and that no testimony to establish it would be received, and the defendants excepted.

The referee also refused to allow them to show that they went into possession under the deed made on the sale under the judgment foreclosing their builder's lien. It appears by the testimony that the defendant Curtis L. North was at one time owner of the premises, that conveyance went from him to Hill, and that Hill mortgaged to the plaintiff.

The facts show that the defendants Tremonger had acquired by operation of law, and not strangers, an interest in or lien on the premises entitling them to question the plaintiff's mortgage, and the defense of usury is available to them.

The case of *Cavan v. Kelly* (3 *Alb. Law Jour.*, 373) holds that an execution creditor having a levy, may avoid a prior chattel mortgage for usury ; and that such defense is available is also held in *Dix v. Van Wyck* (2 *Hill*, 522) ; *Thompson v. VanVechten* (27 *N. Y.*, 568).

In *Williams v. Tilt* (36 *N. Y.*, 319, 325), quoting *Post v. Dart* (8 *Paige*, 640), it is said a mere stranger

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can not insist on the invalidity of an usurious security, but it may be set up by one claiming under the mortgagor.

In *Mason v. Lord* (40 *N. Y.*, 476, 488), it is held, that a judgment creditor having a lien upon the property, has a right to avoid a mortgage prior to his lien by showing it usurious—numerous authorities are quoted at the foot of this case as to what parties may and what parties may not raise the defense of usury, and while the courts seem to have been occasionally in conflict on this question, yet the weight of authority and the later decisions are all in favor of the proposition that it may be set up by a subsequent lienor or a grantee who does not take the estate with an express reservation as to the mortgage security sought to be defeated.

Other cases are cited, in the *Merchants Exchange Bank v. Commercial Warehouse Co.* (49 *N. Y.*, 635, 643), which case also embodies the opinion of JONES, J., of the superior court, in which certain rules are stated and approved upon this question.

On the authority of these cases we hold, that on establishing an interest in the mortgaged premises, which was acquired without any reservation as to the mortgage, the defendants Tremonger were entitled to offer proof of usury to defeat the mortgage in question.

The judgment should, therefore, be reversed, and a new trial granted at special term, costs to abide the event.

WHITMAN *against* NICOLL.

*New York Superior Court, Special Term, January,
1875.*

COSTS.—MOTIONS AND ORDERS.—PLEADING.—APPEAL.
—JUDGMENT.

The costs to be allowed upon a motion for judgment for frivolousness of a demurrer, are the ordinary ten dollars motion fee; the full costs as upon a trial can not be allowed.

An appeal from judgment entered on such a motion is not within subdivisions 134 or 5 of § 349 of the Code—which provides for an appeal from an order granting or refusing a provisional remedy, a new trial, involving the merits, or determining the action, &c.—but is within subdivision 5 of § 307—which provides for costs on other appeals—and the full costs of an appeal from a judgment are to be allowed.

An appeal will not lie from an order overruling a demurrer as frivolous without judgment entered thereon; the appeal is from the judgment.

In this case the defendant demurred to the complaint, and the plaintiff moved at special term for judgment upon the demurrer as frivolous. The court granted the motion, and the following order was entered :

“Ordered and adjudged that the demurrer of the defendants herein be, and the same is hereby overruled as frivolous, and that the plaintiff have judgment for the relief demanded in the complaint, with the costs of the action.”

Several days afterwards the following judgment was entered :

“An order having been entered overruling the de-

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murrer as frivolous, and directing judgment in favor of the plaintiff; now on motion, &c., it is ordered and adjudged that the plaintiff recover of the defendants the sum of, &c. (the amount claimed in the complaint), with, &c., his costs and disbursements."

The plaintiff appealed to the general term "from the order setting aside the demurrer as frivolous, and directing judgment, and also from the judgment entered herein, &c."

The general term reversed the judgment, with costs, and ordered judgment for the defendant upon the demurrer, with costs, but gave leave to the plaintiff to amend, on payment of the costs of the demurrer and subsequent proceedings.

The plaintiff elected to amend, and the clerk in adjusting the costs allowed as costs of the special term the full costs as upon a trial, and of the general term the full costs of an appeal from a judgment.

The plaintiff now applies for readjustment of costs.

G. W. Cotterell, for the plaintiff.

— *Palmer*, for the defendant.

MONELL, Ch. J.—The order made at the special term was upon a motion for judgment on account of the frivolousness of the the demurrer, under section 247 of the Code.

Without attempting to reconcile or determine between the conflicting opinions, I will follow the decision of this court in *The Butchers & Drovers' Bank v. Jacobson* (22 *How. Pr.*, 470), which holds that only a motion fee is taxable upon the motion at special term. See also *Bell v. Noah* (24 *How. Pr.*, 478).

Those were cases where the party prevailing in the motion to overrule the demurrer claimed costs as of a trial, as a part of his judgment. But upon the denial

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of such motion, the demurring party could only claim interlocutory costs. Having been unsuccessful below, he can not have any other costs upon the reversal.

But upon the appeal, the appellant is entitled to the full costs of an appeal from a judgment.

In *Joannes v. Day* (3 *Robt.*, 650) we held that an appeal does not lie from an order overruling a demurrer as frivolous. That the motion, under the Code, is for judgment, and that judgment must be actually entered after an assessment of damages, and the appeal must be from such judgment.

In this case the judgment was actually entered, and the appeal was not from the order exclusively, but also from the judgment; and it was entertained only because it was an appeal from the judgment.

It was not, therefore, an appeal under subdivisions 1, 3, 4 and 5 of section 349 of the Code of Procedure, but it falls within the 5th subdivision of section 307, and the appellant is entitled to the costs therein specified.

It will be observed that both the order and judgment are absolute and without condition. The demurrer was overruled as frivolous, and judgment was ordered for the plaintiff in the action. No one can doubt that had the general term affirmed the judgment, the respondent would have been entitled to the full costs of an appeal from a judgment. Why should not the appellant be entitled at same the rate upon a reversal?

The case of *Hoffman v. Barry* (2 *Hun.*, 52), sustains this view, although that was an appeal from an order overruling a demurrer, and granting to leave amend.

The court held that while the right to amend was unexpired it was a mere order, and upon the appeal from it, motion costs only were taxable. But they say: When the order becomes final by the expiration of the time to amend, full costs are allowed on the appeal.

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The costs must be readjusted by disallowing all costs of the special term, except a motion fee of ten dollars.

SMITH *against* CHRISTOPHER.

*Supreme Court, Second Department, Second District ;
General Term, February, 1875.*

SURROGATE COURTS.—EXECUTOR.—EVIDENCE.

Under 2 R. S., 88, § 33, which provides that no part of the property of the deceased shall be retained by an executor or administrator, in satisfaction of his own debt or claim, until it shall have been proved to and allowed by the surrogate—and L. 1837, ch. 460, p. 531, § 37—(supplemental to that section), which allows any executor or administrator to prove his own claim against the estate upon the service of a citation on the proper parties and the return thereof, or on a final accounting—it is error for the surrogate to refuse to admit evidence of a claim by an executor against the estate on an accounting sought from him by the legatees thereof.

Such a case is not to be confounded with the claim of a creditor, not an executor or administrator, which is disputed by the executor; in regard to which the surrogate has no jurisdiction.

Concerning the ownership of a bond in the possession of a testator at the time of his demise, but thereafter claimed and taken by the executor as his own property, the surrogate had admitted the testimony of the widow repeating declarations of the testator in his lifetime to her, in which he declared himself to be the owner of the bond; but had excluded written declarations bearing the testator's signature, offered in behalf of the executor, which tended to sustain the executor's title to the bond. *Held*, that if the evidence of the declarations to the wife were properly admitted under section 399 of the Code of Procedure—which prohibits the admission in

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evidence of the testimony of a party or person in interest, or of a person through whom either may derive as to any communication between the witness and the deceased, or insane, &c., against the executor heir, next of kin, legatee, committee, &c.; but which provides that this prohibition shall not extend to any transaction or communication as to which such executor, heir, next of kin, legatee, committee, &c., shall be examined in his own behalf, or as to which the testimony of the deceased or insane shall have been received—the counter declarations in writing offered should have been received.

Abram Smith, as executor of Edward Smith who died in March, 1867, brought this appeal from a decree of the surrogate of Rockland county, and made Jane Christopher and Enos Smith, who were legatees under Edward Smith's will, respondents.

The petition after alleging the probate of the will and the due execution of his duties by the executor, set forth that he was the son of the testator, and during the latter's lifetime loaned to one Stevens, the sum of three thousand dollars upon the bond of said Stevens secured by mortgage: That he entrusted this bond to the testator to collect the interest: That the obligors paid two thousand dollars on account of the principal sum to the testator: That the testator received the same for Abram Smith's benefit, and so expressed himself when he received it: That the executor subsequently received from the obligors the residue of the amount due on the bond: That the executor also left with the testator a state certificate or bond for the sum of three thousand dollars to be exchanged for other bonds, and before such exchange was effected testator died: That the executor paid the legacies of the respondents, with a slight rebate, though the assets of the estate did not suffice for him to do this, and to pay the indebtedness of the estate to himself: That he took the state bond for three thousand dollars last mentioned into his own possession:

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That subsequently to the occurrence of the foregoing facts, the respondent Christopher, petitioned the surrogate for an accounting by the executor: That such accounting was had, and upon it the surrogate erred in admitting evidence of the statements of the testator made to third persons in the absence of the present executor, to disprove the latter's ownership of the state bond, and in rejecting writings by the testator in his lifetime to show that he who is the present executor did own it: That the surrogate erred in refusing to entertain the executor's claim against the estate for the two thousand dollars, and for notes signed by the testator in his favor for the sum of nine hundred and fifty dollars: That the respondents, who claim an interest in the estate, answer, &c.

The surrogate had decided, all the parties in interest being before him, that the state bond belonged to the testator and was registered in the present executor's name to evade the taxation thereof; and had declined to entertain jurisdiction of the executor's claim against the estate, saying that his remedy therefor was by action in another court.

The answer charged the wrongful appropriation of the personal property of the estate by the executor to his own use; that the acceptance of payment of the legacies made subject to a rebate was induced by his misrepresentation; that the decree of the surrogate was proper.

Geo. W. Wager, for the appellant.—The objections taken to the introduction of the writings by the testator in his lifetime, to show that the present executor was the owner of the state bond were not tenable; and all other objections are waived by taking untentable ones (*Dunham v. Simmons*, 3 *Hill*, 609; *Blossom v. Barrett*, 37 *N. Y.*, 434; *Fountain v. Pettee*, 38 *Id.*, 184). If respondents could give verbal declarations of deceased in

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his own interest, his written declarations were admissible. Declarations of deceased, verbal or written, against his interest are always admissible (1 *Phill. Ev.*, 255; 1 *Greenl. Ev.*, 213; *Hicks v. Gildersleeve*, 4 *Abb. Pr.*, 1; *Gibney v. Marchay*, 34 *N. Y.*, 301). The finding of the surrogate that he had no jurisdiction of the claim against the estate was erroneous (*Dayton on Surr.*, 478; *Williams v. Purdy*, 6 *Paige*, 168; *Gardner v. Gardner*, 7 *Id.*, 112; *Jumel v. Jumel*, 7 *Id.*, 591; *Payne v. Mathews*, 6 *Id.*, 20; citing also the authorities referred to in the opinion below).

Andrew Fallon, for the respondents.—The surrogate had authority to adjudicate as to the state bond (2 *R. S.*, 220, § 1, subd. 3). And to enforce the payment of the legacies (2 *R. S.*, 220, § 1, subds. 4, 6). The written admissions by the testator were properly excluded as occurring between the executor and the testator. The surrogate properly refused to pass upon the disputed claims of the executor (*Andrews v. Wallege*, 17 *Hov. Pr.*, 263; *Tucker v. Tucker*, 4 *Abb. Ct. App. Dec.*, 428).

BY THE COURT.*—TAPPEN, J. [after stating the facts].—Inasmuch as an executor can not sue himself in an action at law, it is provided by statute, that no part of the property of the deceased shall be retained by an executor or administrator in satisfaction of his own debt or claim, until it shall have been proved to and allowed by the surrogate; and the proof of such debt or claim may be made on the service and return of a citation for that purpose, directed to the proper persons, or on the final accounting (2 *R. S.*, 88, 4th ed. p.

* Present, BARNARD, P. J., AND TAPPEN, J. (DONOHUE, J., sat at the argument, but was not present when the opinion was handed down.)

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274); and this course is the general practice (*Dayton's Surrogates*, 359; *Moore v. Moore*, 21 *How. Pr.*, 211; *Robinson v. Raynor*, 28 *N. Y.*, 494, rev'g 36 *Barb.*, 198; *Matter of Cunningham*, 1 *Hun. Supm. Ct.* 214).

This proceeding is not to be confounded with the claim of a creditor disputed by the executor, where such creditor is not either an executor or administrator; in such a case the surrogate has not jurisdiction (*Andrews v. Wallege*, 17 *How. Pr.*, 263).

But where an executor or administrator is a creditor of the deceased, the statute expressly authorizes proof of his claim to, and its examination by the surrogate, and he is not permitted to retain any part of the property of the deceased in satisfaction thereof, without such proceedings.

The surrogate on passing upon the claim of the executor to the three thousand dollar bond, admitted the testimony of a party to the proceeding, being the testator's widow, who testified to her husband's declaration of ownership in himself; the executor thereupon offered two written declarations having the testator's signature, and tending to sustain the executor's title to the bond, and these, on objection, were excluded.

We are not now prepared to say how far they are affected or excluded by section 399 of the Code; but if a party in interest testifies to declarations of a deceased person, the prohibition contained in that section does not apply, and counter declarations are admissible.

Inasmuch as the case must go back to the surrogate to take proof of a claim offered by the executor as a creditor, the whole proceeding will then be before him, and any error in receiving or rejecting testimony can be corrected.

Decree reversed, and proceedings remitted to surrogate, costs to abide event.

GALLAGHER *against* NICHOLS.*Court of Appeals, April, 1875.*

GUARANTY.—ACTION AGAINST ACCEPTOR.—EFFECT OF ORDER FOR PAYMENT AND ACCEPTANCE THEREOF.

—ASSIGNMENT.—EXTENSION OF TIME FOR PERFORMANCE.—WAIVER OF FORFEITURE.—OMISSION OF PROOF.—CONSIDERATION.

Where one who had contracted to do work upon a building for a compensation mentioned in the contract procured his employer to give at the foot of the contract, an order on the owner of the land for payment, which order the owner accepted in writing—*held*, that an action would lie upon the acceptance.*

The assignee of such a contract, to whom it has been delivered with the order and acceptance appended, may recover as assignee of the acceptance.†

The distinction between such an acceptance and a guaranty explained.

A contractor's failure to perform within the time limited, will not prevent a recovery, after performance has been completed, without objection made by the employer.

Appeal from a judgment.

It appeared that the defendant, William B. Nichols, had made a contract with one Lewis, for the erection of certain buildings upon land belonging to defendant, and which defendant agreed to convey to Lewis after the building should be completed, defendant meanwhile to make advances to Lewis in the manner provided for

* See Hall v. City of Buffalo, 2 Abb. Ct. App. Dec. 301.

† See Dorsheimer v. Nichols, 1 Abb. Ct. App. Dec. 519.

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in the contract. Lewis contracted with Gosson and Monohon to excavate the cellars and build the cellar walls, and gave them an order at the foot of the contract, for the payment of the amount due upon the contract. This order was payable "on the completion of the above contract when approved by him."

The order having been accepted by the defendant in writing, and not being paid, the holders assigned the contract to the plaintiff, and delivered to him the paper including the order and acceptance thereon. Plaintiff having recovered, defendant appealed.

Effingham H. Nichols & J. Tredwell Nichols, for appellant.

N. C. Moak & Thomas E. Pearsall, for respondents.

MILLER, J.—The first question which demands consideration in this case, is as to the effect and nature of the acceptance of the order or draft drawn by Lewis upon the defendant. The draft was drawn in favor of Gosson and Monohon; who had agreed to perform a certain portion of the work which Lewis had entered into a contract with the defendant to perform in the erection of certain buildings upon the land of the defendant. The order was drawn at the end of the contract of Lewis with Gosson and Monohon, for the amount to be paid to them "on the completion of the above contract when approved by me." The counsel for the defendant claims, that the contract created by the acceptance, if valid, was collateral to an original contract on the part of Lewis; a promise to pay the debt of another, and therefore a contract of suretyship or guaranty, and hence within the statute of frauds.

A guaranty is defined by the elementary writers to be a promise to answer for the payment of some debt or

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performance of some duty, in the case of the failure of another person, who in the first instance is liable for such payment or performance (*Fell on Guaranty and Suretyship*, 1, 3; *Kent Com.*, 121); it is a contract which is frequently made in reference to commercial transactions, and when applied to commercial paper bears some analogy to that of an endorser. When made, the guaranty is usually incorporated in the agreement, thus expressing the actual nature of the contract. When this is done, the purpose of the obligation is plain and distinct. In the case at bar, the term guaranty was not employed, but the defendant accepted the order of Lewis, which was virtually an agreement to pay the same when the amount therein mentioned became due. If it had been an ordinary draft in the usual form, the acceptor of the same no doubt would have been liable upon his acceptance as it was drawn, referring to a contract which had previously been entered into. I think the order and acceptance must be considered in connection with the contract to which it related, and of which it is fairly to be assumed it constituted a part. They must be construed together as relating to one entire transaction.

The case shows that the defendant had made a contract with Lewis for the erection of certain buildings upon land which the defendant owned, and which he was to convey to Lewis after the buildings were completed. The defendant making advances to him as provided in the contract, Lewis contracted with Gosson and Monohon to excavate the cellars, and build the cellar walls, and made the order for the amount of the contract upon the defendant, who accepted the same upon the conditions stated in the acceptance.

This constituted the entire arrangement, and I am unable to discover any valid ground upon which it can be claimed, that the acceptance of the defendant was a

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contract of suretyship. The defendant did not expressly agree to pay if Lewis did not ; nor was the instrument signed of a character in which he might be considered as a surety of an original undertaking. An acceptance is an assent or agreement to comply with the request or order contained in the bill, or in other words, an assent or agreement to pay the bill according to the tenor of the acceptance when due (1 *Parsons, Notes and Bills*, 281), and the defendant by this agreement bound himself to pay the amount specified upon the completion of the contract when approved by Lewis. This was an independent contract, and constituted the defendant a party to the contract made by Lewis, for the excavation of the cellars and the building of the cellar walls. It was not an undertaking to answer for the debt, default or miscarriage of another ; but an absolute agreement for performance on his part.

In *Van Wagner v. Terrett* (27 *Barb.*, 181), an agreement was entered into for the erection of certain buildings, and a draft was drawn by the contractor upon the defendant, who had entered into the contract with the builder, for the payment of a sum of money as per contract and to be applied on the second payment, which draft was accepted by the defendant, and it was held that the draft was not a bill of exchange, because it was not for the payment of money absolutely, and at all events that the acceptance was not a guaranty, because the relation of the principal and surety did not exist at the time the draft was accepted, and it was not created thereby, and that the promise was an original undertaking. Of a simular import is *Studwell v. Terrett* (4 *Bosw.*, 527). The cases cited are directly in point, and in principle analagous to the case at bar.

It may therefore, I think, be assumed that the defendant undertook to pay absolutely upon the completion of the contract and its approval by Lewis ; his liability was not made contingent upon the failure of

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Lewis to pay, but was unqualified. The excavation of the cellars and the erection of the foundation walls were in point of fact for the benefit of the defendant, and the written acceptance of the order by the defendant under the circumstances may be regarded as an original, and not as a collateral undertaking upon which the contractors relied in the actual performance of the work under the contract (See *Delvin v. Woodgate*, 34 *Barb.*, 252). In the case of *Wilson v. Roberts* (5 *Bosw.*, 100), which is cited by the defendant's counsel and relied upon as sustaining the doctrine that the contract in question was a contract of guaranty. There was a contract to deliver stone by one Beattie to one Cronk. Cronk agreed to pay for the stone by delivering to Beattie certain notes of Roberts, and drew an order on Roberts for said notes, which the latter accepted. It did not appear that Roberts was indebted to Cronk or bound to advance his note, or that he had any interest whatever in the contract. BOSWORTH, Ch. J., delivered the opinion, and it was held that there was no averment in the complaint, nor any proof that the stone was to be the property of Roberts when furnished; that no consideration was expressed in the order or acceptance, and the plaintiff could not recover. The same judge delivered the opinion in *Studwell v. Terrett* (4 *Bosw.*, 527), *supra*, where he cites approvingly *VanWagner v. Terrett* (27 *Barb.*, 181), already referred to. It will be seen that the case relied upon does not sustain the doctrine that the defendant's contract was a guaranty or a collateral undertaking in any respect.

As there was no guaranty, the next question to be considered is what was the effect of the order and acceptance. By the original contract between Lewis and the defendant, the latter was to pay Lewis five thousand dollars on or before the first tier of beams were on. By the contract between Lewis and Monohon, the sum

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of three thousand seven hundred and fifty dollars was payable at the same time. This provision was modified by the acceptance of the order, and the defendant was to pay three thousand seven hundred and fifty dollars of the amount payable when the contract was completed and approved by Lewis, not beyond the time when the first payment was due. The defendant made Lewis the arbitrator to decide when the work was completed, and his approval and determination was a final settlement of the question. To this extent the contract was altered by the acceptance of the order.

Although the order does not specifically refer to the contract between Lewis and Nichols in terms, yet it does refer to and is made a portion of a contract of Lewis with Gosson and Monohon, and the contract between Lewis and the defendant having been introduced in evidence, it is entirely apparent that the order was to be paid from the money arising from the funds which was to be realized under the last mentioned contract. The order and acceptance related to the funds, and was an appropriation of the money which was payable by the defendant when that money was actually due. The authorities which hold that the order must specify the fund from which the money is to be paid to constitute an assignment, are cases where there was no written acceptance of the order (*Watson v. The Duke of Wellington*, 1 *Russ. & Mylne*, 602; *Philips v. Stagg*, 2 *Edw. Ch.* 188; *Hutter v. Ellwanger*, 4 *Lans.*, 8, 12, 13).

The order in this case having been accepted by the defendant in connection with the acceptance, I think operated *per se* as an assignment of the fund which the defendant might become liable to pay within *Lowrey v. Steward* (25 *N. Y.*, 239); See also *Parker v. City of Syracuse* (31 *Id.*, 376).

But whether it was an assignment or not, it was a promise to pay upon the completion of the work men-

tioned in the contract alluded to, and upon its approval by Lewis. Nor was the legal effect of the order and acceptance at all dependent on parol evidence to render it valid. These instruments and the contract constituted an absolute contract to pay when the contract mentioned was fulfilled and approved, and made the defendant liable without regard to the question whether there was an assignment, which, as we have seen, the authorities hold is peculiarly applicable, when there is a question of priority as to the right of creditors to the funds.

The defendant's counsel urges several objections, upon the assumption that the contract was a contract of guaranty and not an independent contract, and as I have arrived at the conclusion that it was not a contract of guaranty, it is only necessary to examine such of them as possibly may be applicable to this aspect of the case.

1. As to the extention of the time of completion of the contract,—it was assented to by Lewis and the contractor, and the failure of the plaintiff to perform within the time limited in the contract will not prevent a recovery upon the performance after the time specified, if the delay was assented to by the defendant. There was proof to show that the defendant assented to the prosecution of the work after the time for its completion had expired; that he superintended it; was there sometimes twice a day; and until the walls were completed he made no objection and conveyed no intimation that the delay did not meet his approval. When there is no willful departure from the terms of the contract, nor any material omission in its essential parts, and the contractor has faithfully performed it in substance, he will not be held to have forfeited his rights by reason of an unimportant or strictly technical omission. A substantial compliance is only required, and if the owner suffers the builder to go on after the time limited has expired, without expressing his disappro-

val, he waives the forfeiture which he might otherwise have claimed. He was bound to express his dissatisfaction at the delay, and if he had intended to take advantage of it, should have acted with promptness at the time, instead of allowing the contractor to expend time and money in the completion of the work (*Smith v. Gugerty*, 4 *Barb.*, 614; *Mayor of New York v. Butler*, 1 *Id.*, 325; *Sinclair v. Tallmadge*, 35 *Id.*, 602).

2. It is insisted that there was a failure of the condition precedent, which requires that the first tier of beams should be laid on and levelled up before any payment was to be made. The answer to this position is, that the act of the defendant prevented the laying of the first tier of beams. The walls were ready for them, and the defendant was bound to have them laid within a reasonable time. Instead of this, defendant Lewis cancelled the contract by mutual consent on August 12, and Nichols sold the lots. The defendant thus made it impossible for this to be done, and he is estopped from insisting upon any such condition (*Burtis v. Thompson*, 42 *N. Y.*, 246).

3. It is said that the order was never assigned or transferred to the plaintiff. I do not discover that this point was made upon the trial. If it had been, it may have been obviated by proper proof, and therefore it is not important to consider. It may be observed the order and acceptance were a part of the contract, and with the contract were delivered to the plaintiff, and, I think, passed with the assignment of the contract, which carried everything relating to it. The order and acceptance were the means of enforcing payment of the demands against the defendant, and a transfer of the contract operated according to law to assign everything relating to it (See *Bolen v. Crosby*, 49 *N. Y.*, 183, 184).

The point that the acceptance of the defendant was without consideration and therefore *nudum pactum* is

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not well taken. It does not appear to have been urged upon the trial. But even if it was, a sufficient consideration appears in the papers upon which the plaintiff's cause of action is founded. The object of the acceptance was to assure the completion of the work mentioned in the contract, which was quite enough to establish a good consideration.

There is no other question in the case which demands comment, and after a careful examination I am satisfied that the judgment was right, and should be affirmed.

CHURCH, Ch. J., concurred.

FOLGER, RAPALLO, and ANDREWS, JJ., concurred in result.

ALLEN and GROVER, JJ., absent.

KOEHUCKE *against* ROSS.

New York Common Pleas, Special Term, January,
1875.

WITNESS.—CHARGE.—FALSUS IN UNO.

The jury are not bound to disregard the testimony of a witness on all points, because of false testimony on one material point, if it be a point on which the witness might be presumed liable to a mistake.*

* The following authorities illustrate the application of the maxim here invoked: *Dunlop v. Patterson*, 5 Cow., 243 (1825. Opinion by WOODWORTH, J.). Held, that although the jury are judges of fact and

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Thus, where plaintiff testified that she made a loan without security, and that it was never repaid her; and the defendant testified that the money was borrowed on a pledge, and was subsequently repaid;

of the credibility of witnesses, yet in the exercise of this power they must be governed by the judgment of the law on the facts. If the law has adjudged that certain facts render a witness unworthy of credit, the jury can not rightfully give credit to his testimony, or found a verdict upon it.

Accordingly, where it was proved that a witness had made extrajudicial statements, and given testimony on a previous trial contrary to his testimony on the present trial on one point, and no reason was assigned for this prevarication, held, that he was not a credible witness, unless supported as to the material fact involved in the contradiction; and that the testimony of another witness corroborating him as to some collateral facts was no corroboration within the rule; and that it was error for the court to charge that the jury might give the testimony of the first witness such weight as they thought it deserved. The law will not permit either life or property to be put in jeopardy by such testimony. If it would, there must be but little security for either.

This case was questioned in *Dunn v. People*, 29 *N. Y.*, 523, but its authority is fully re-established by the court of appeals in *People v. Evans*, 40 *Id.*, 1, 6.

People v. Davis, 15 *Wend.*, 602 (1836. Opinion by COWEN, J.). Where a witness, brought up on attachment for disobeying subpoena, made affidavit that the ticket was not now in his possession, but did not account for it, and left room to suspect its willful suppression, and perhaps a misrepresentation of its contents: held, that excuses for not appearing alleged in his affidavit, even had they been in a more tangible shape, resting as they did upon his unsupported oath, could hardly be received. *Falsus in uno, falsus in omnibus*, is a maxim which does not stop at *nisi prius*. All the rules of evidence, which govern in the estimate of its weight or effect, are essential to the discovery of truth whether addressed to a jury, or coming in the form of written answers or depositions.

Stafford v. Leamy, 34 *N. Y. Superior Ct.*, 269 (1872. Opinion by SEDGWICK, J.). The impeachment or contradiction which makes it the duty of the jury or referee to regard the witness as discredited need not necessarily come from witnesses opposed to the witness whose credibility is in question, but may come from the cross-examination. Hence, if in the testimony of witnesses presented by a party there is anything which tends to the impeachment of their credibility, a referee will be

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and on rebuttal plaintiff testified that the loan upon the pledge was a separate transaction; but it appeared that the money when repaid was not counted,—*held*, that as the circumstance was one of a na-

supported in disregarding their testimony. It is not necessary to conclude that the witnesses had intentionally testified falsely. A want of intelligence or memory that incapacitates them from representing a past event, so that reliance could be placed upon them, leads to the same result.

Brett v. Catlin, 47 Barb., 404 (Opinion by MULLIN, J.). Held, that as a general proposition proof of willful and corrupt perjury as to one material fact in the case renders a witness unworthy of credit as to any other matter to which he may have testified. But he may be corroborated, and being corroborated he may be believed. Where he is corroborated, it is not error to refuse to charge that he is wholly unworthy of credit.

Wilkins v. Earle, 44 N. Y., 172. The jury must believe the evidence to be willfully false in some particular in order to sustain an instruction that they must discredit the whole evidence of the witness.

The Santissima Trinidad, 7 Wheat., 283, 339 (1822. Opinion by STORY, J.):

“Where the party [meaning witness] speaks to a fact in respect to which he can not be presumed to be liable to mistake,” . . . “if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law and morality and justice, to apply the maxim, *falsus in uno, falsus in omnibus*.”

The State v. Jim, 1 Devereaux (No. Car.), 508 (1828. Opinion by HENDERSON, J.), expressly concurred in by TAYLOR, Ch. J.

If a witness is incorrect in his statement as to one or more facts, but not corruptly so, he is not discredited further than discredit would arise from a want of reliance on the correctness of his conceptions, or from a distrust of his powers of memory.

“But when once they [the jury] are *satisfied of the witness's corruption*, they are bound, in obedience to the law, to disregard all that he swore to.”

“A witness who gives false testimony as to one particular, can not be credited as to any.”

[Approved in 1854, in State v. Pearce, 1 Jones Law (No. Car.), 251 (Opinion by PEARSON, J.), so far as it applies to testimony willfully false in regard to a matter material to the issue.]

State v. Williams, 2 Jones (Law No. Car.), 257 (1855).

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ture concerning which a party might be mistaken or might be deceived, disbelief of the testimony on that point did not necessarily discredit the plaintiff's testimony on the other points.

The opinion of BATTLE, J., in this case, approves the principle laid down in *The State v. Jim*, in 1 *Dev.*, maintaining that it applies to the instruction to be given to the jury rather than to the exclusion of the evidence from their consideration.

The opinion of PEARSON, J., which seems to be that of the court, disapproves *The State v. Jim*, though in neither was its consideration absolutely necessary. Both opinions concur in the judgment to be given.

Ingram v. Watkins, 1 *Dev. & Bat. (No. Car.)*, 442 (1836. Opinion by GASTON, J.):

"He who falsifies himself on one point [this was by testimony in conflict with a former sworn statement in one particular only] is undeserving of belief in all; *falsus in uno, falsus in omnibus*."

Mercer v. Wright, 3 *Wisc.*, 645 (1854. Opinion by SMITH, J.):

"When a witness deliberately and knowingly swears falsely in regard to one material fact, the jury are not bound to believe him in any of his statements, unless he is corroborated."

Roth v. Wells, 29 *N. Y.*, 471 (1864. Opinions by SELDON (H. R.) and MULLIN, JJ., all concurring). The judge at the trial had charged that if the jury found the witness had sworn falsely, knowingly, he was not entitled to belief in relation to any fact sworn to by him.

Held, no error.

[The witness was a party plaintiff. Most of his evidence was material to the issue, and if false to his knowledge, he had committed perjury. The judge prefaced his charge, as to the instruction in point, by the remark that the jury were the judges of credibility. The action was brought to recover the price of goods seized by defendant's testator, a sheriff.]

Butler v. Truslow, 55 *Barb.*, 293 (1869. Opinion by PECKHAM, J.). Where the general tenor of the testimony of a witness was contradicted by other witnesses and by his own writings, and the referee held that notwithstanding many circumstances tending to weaken and disparage his testimony, yet in view of all the circumstances he felt impelled to believe him in one particular, *held*, error. *Falsus in uno, falsus in omnibus*, is a sound rule.

Gilbert on Evidence (Loffe's ed. 1795) 287:

"If what he [the witness] says be contradictory that removes him from all credit."

"*Allegans contraria non est audiendus*."

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Amelia Koehucke sued Joseph Ross to recover nine thousand one hundred dollars alleged to have been loaned in four different sums.

The defense was that one of the sums, two thousand seven hundred and fifty dollars, was never received; that the sum of two thousand three hundred and fifty dollars was but two thousand dollars, and this two thousand dollars and the other two sums were returned to the plaintiff before this action was commenced. The answer also contains five counter-claims against the plaintiff.

The case was tried before J. F. DALY, J., and a jury, and plaintiff had a verdict for all the sums claimed, with the interest, except the item of fifteen hundred dollars, which the jury decided had been repaid, and the jury allowed the defendant on certain counter-claims seven hundred and two dollars and sixty-nine cents.

A motion for a non-suit was denied.

A. H. Reavey, for defendant, moved for a new trial on a case made.

Stalknecht, Hall & McMahon and *C. Shaffer*, opposed.

J. F. DALY, J.—The jury was not bound to disregard all the testimony of the plaintiff, unless they believed not only that her testimony on a material issue

Starkie on Evidence, 872 (8th Am. ed. by SHARSWOOD):

“A witness who gives false testimony as to one particular, can not be credited as to any, according to the legal maxim, *falsum in uno, falsum in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony can not be partial or fractional; where any material fact rests on his testimony, the decree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected.”

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was false, but willfully and corruptly false (*Wilkins v. Earle*, 44 *N. Y.*, 182 ; *People v. Evans*, 40 *Id.*, 5 ; *Brett v. Catlin*, 47 *Barb.*, 404 ; *The Santissima Trinidad*, 7 *Wheat.*, 339).

In the case last quoted the United States Supreme Court, says : "Where a party testified to a fact in respect of which he can not be presumed liable to a mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood ; and courts of justice under such circumstances are bound upon principles of law and morality and justice to apply the maxim, "*falsus in uno, falsus in omnibus*."

These remarks not only lay down the true rule, but give suggestive instances of its application. Strictly judged by it the plaintiff here might still claim credibility as a witness on all the issues except the one which the jury found against her. On the issues as to the loan and re-payment of fifteen hundred dollars, the jury disbelieved her positive statement that the money had never been repaid. The defendant swore that it had been, and so did the witness Morrison. From the circumstance that wherever plaintiff and defendant were in conflict on the other issues, the jury found against defendant, it is safe to assume that the finding against plaintiff as to the fifteen hundred dollars was based upon Morrison's testimony.

But was the fact as to which she and Morrison disagreed one "in respect of which she could not be presumed liable to a mistake"? Clearly it was not.

It was upon the question as to the re-payment of a loan made by the plaintiff to the defendant of fifteen hundred dollars ; plaintiff swearing that she loaned it without security, and that it was never re-paid her ; defendant swearing that it was borrowed by him for

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one Morrison on a pledge of watches deposited with plaintiff, and defendant and Morrison swearing that the fifteen hundred dollars was subsequently paid to plaintiff and the watches redeemed ; plaintiff in rebuttal swearing that the loan by her to defendant on the security of the watches was a separate affair, amounted to two hundred dollars only, and was subsequently paid. When the money was paid her by Morrison, through defendant, it was not counted, and her attention was not called to the amount in such a manner as to preclude the possibility of error. It was one of those circumstances concerning which a party might be mistaken, or might have been deceived, not one where mistake or deception was impossible, such as residence, place of birth, particular voyages made, &c. ; facts which so fix themselves upon the memory, or become a part of one's life and history to such an extent as to preclude assumptions of unintentional error.

The motion for new trial must be denied.

Welch v. Pullman Palace Car Co.

WELCH *against* THE PULLMAN PALACE CAR
COMPANY.

*Superior Court of Buffalo ; General Term, December,
1874.*

CAUSE OF ACTION.—LIABILITY OF PALACE CAR COM-
PANY.

A traveller who takes accommodations in a palace car or drawing-room car, belonging to a company separate from the railroad company by which the train is run, and who retains in his own possession articles of apparel which he carries with him, can not hold the company to any stricter liability for his loss than that to which he could hold a railroad company.

The liability of a palace car company, or drawing-room car company, to passengers for loss of articles which the passengers carry with them into the car, is not in the absence of special contract, any greater than that of any other carrier of passengers.

Such companies are not to be held to the strict liabilities of inn-keepers.

Appeal by defendant from a judgment of a court of a justice of the peace.

The facts shown by the return are as follows : The defendant is a corporation created by and under the laws of the state of Illinios, with power "to manufacture, construct, and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same to sell or use, or permit to be used, in such manner and upon such terms as it may think proper."

Sleeping cars owned by the defendant were run upon The Great Western Railway on its night trains

between Detroit and Buffalo, under an agreement with the railway company by which the defendant was to construct and place upon the road for all night trains, sleeping cars for the use and accommodation of passengers, with all the conveniences necessary, and to furnish and employ servants to take the care and management of them and of the business carried on by means of them, "be responsible for all proper care and management of the inside of the cars, and all which pertains thereto;" have the entire control of the admission of passengers into said cars, and collect and have the charges for the use of the beds, and to have the exclusive right to run sleeping cars upon said railway for the period of ten years from April 2, 1866. By the same agreement, the railway company was to draw the cars on all their night trains, furnish them lights and fuel, keep the running gear and body of the cars in repair, and assume all risk of casualties to passengers.

On the evening of October 30, 1873, the plaintiff took passage upon said railway from Detroit to Buffalo, by the night train; paid his fare to the railway company, whose ordinary traveling cars formed a part of the train, and engaged passage and a bed for the night in the defendant's sleeping car, paying the charge therefor. When he went to bed, he placed his overcoat in a vacant berth over that in which he slept, and hung up his coat, vest, hat, &c., upon nails or hooks near his berth. The interior of the car was one room common to all passengers therein; with seats arranged for use in the day time like those in the ordinary passenger cars, and which at night were converted into beds or berths. The berths were curtained, but not otherwise enclosed. No place in the car was assigned for the clothing which passengers laid aside when retiring to sleep, or for hand-satchels or such articles of personal convenience as passengers usually take with them into the cars, but such clothing and articles were usually laid by passen-

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gers in their own or vacant berths, or hung up near them. When the cars arrived at Buffalo, the respondent's overcoat was missing, and could not be found. The action was instituted to recover its value, and the justice rendered a judgment therefor, from which the defendant appealed.

Edward R. Bacon, for appellant.

Grover Cleveland, for respondent.

BY THE COURT.*—SHELDON, J.—Before the introduction of traveling cars of the kind upon which the alleged loss occurred, the rights, duties and liabilities of the passenger and carrier were well determined. They were the same, whether the traveler journeyed by day or by night. Upon payment of his fare he was entitled to be transported, and could not be refused, save in exceptional cases, to which it is now unnecessary to refer. The luggage which he delivered to the possession and custody of the carrier, was insured to be delivered on demand, while as to that which he chose and was allowed to keep with him, in fact remaining within his possession and control, he was held to reasonable care, and the carrier was liable for loss only in case of negligence in some part of the duty which devolved upon it; and as to the articles of present use, such as the overcoat in question, which he retained in his own care and keeping, the carrier was held to no responsibility, unless negligence could be imputed. This rule, as to articles last described, was authoritatively settled by the opinion of Chief Justice NELSON in *Tower v. The Utica & Schenectady Railroad Company* (7 Hill, 47), and has been universally recognized and acted upon by the public as a just rule of common law (Tally

* Present, CLINTON, Ch. J., SHELDON and SMITH, JJ.

v. Great Western Railway Company, 6 *L. R. C. P.*, 44).

The passenger traveled by night or by day, sleeping or waking, as he chose, but he was the sole guardian of the property which for his own comfort and convenience he had elected to care for and keep upon or near his person, and was remediless as regards the carrier if it was lost or stolen.

In this case, for the fare paid to the railroad company, the same usual and ordinary means of conveyance were provided. The plaintiff was entitled to be carried with his luggage from Detroit to Buffalo in the cars provided by the railroad company, and the law defined the rights, duties, and liabilities of those contracting parties. That the railroad company licensed the defendant or any one else to place a car upon its track differing as to its accommodations, in which the plaintiff rode, in no manner relieved it from the duties and liabilities imposed by its contract for safe and secure passage. In case of loss or damage to person or property, the company was liable, for it allowed the plaintiff to elect in which car he would be carried ; but it seems to be assumed in this case that it was not liable to any greater extent than if the plaintiff rode upon the ordinary car for passage upon which the fare was paid. But, in truth, it may be said that as this car was under the control of the road through its train conductor, and was provided by the road with the expectation that it would be used by travelers, the road itself is liable to the fullest extent that can, upon any principle, be adjudged against the defendant.

However this may be, the necessity of the traveler, out of which the common-law rule originated, had been supplied by the railroad company. He was provided for and furnished all the accommodations he paid for or expected of the company, and it is not suggested but what they were proper and reasonable. But the plain-

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tiff, the traveler, did not choose to avail himself of them, preferring the other accommodations provided by the defendant with the license of the railroad, and the question here is, whether upon the facts found any other duty, right, or liability obtained between these parties than those referred to as existing between the carrier and passenger. Was any greater shield thrown around the plaintiff or his property for their protection, when he entered the defendant's car and availed himself of those extra accommodations?

It can not, truthfully, be contended that there was any delivery of the coat into the custody of the defendant different from the delivery of it that he would have made to the railroad company had he elected to travel by the ordinary cars. He carried it with him to wear or to put off, as the exigencies of his health or the weather required. There was no place to deposit it, and he sought none, nor was it expected that one would be provided.

Upon these facts, the defendant should not be held liable. It is unnecessary to remark that the extra payment made to the defendant procured for the plaintiff many other comforts and luxuries beside that of lying down and sleeping if he chose. He obtained comparative protection for himself and his property, and immunity from disturbance during the passage. These facts afford no solution of the question. But the fact exists that the most discreet and vigilant officers of a car can not prevent depredations, and if this duty is imposed by law, it is impracticable to meet the responsibility, and the law requires nothing unreasonable or unjust of any member of society.

It is sought to charge the defendant with the responsibility of the inn-keeper, upon the assumption that the law implied a contract or imposed a liability of the same nature. That responsibility was declared by the civil law to be as strict and severe as that of common

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carriers, and modern jurisprudence has adopted and applied the principle. But it went no farther, as is sought to be done in this case. The liability of the inn-keeper arises out of facts which do not exist in this case. He can not lawfully refuse to receive guests to the extent of his reasonable accommodations, nor can he impose unreasonable terms upon them. The necessities of the traveler required these just rules to be adopted. As a compensation for the responsibility thus incurred, he has a lien upon all the property of the guest at the inn for all his expenses there. There are no facts in this case justifying the application of such rules of law. The defendant could not be compelled to receive and entertain passengers, however amenable it might be upon its contract with the carrier, and it had no lien for the price of the accommodations. The traveler voluntarily, and not of necessity availed himself of what was placed before him for his comfort, and he can not cast the burden of care and diligence upon the defendant, neither is it right or just that the law should do so. Unless the court can determine after the most mature consideration that it is required to apply some general well settled principle of the common law to a new case arising out of circumstances or emergencies developed by the progress of society, so that common justice may be subserved and enforced among the people, it should refrain from making the application.

The judgment appealed from should be reversed, with costs.

CLINTON, Ch, J., concurring.

SMITH, J., dissenting.

Judgment reversed. with costs.

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MCGRAW *against* GODFREY.

[Affirming 14 Abb. Pr. N. S. 397.]

Court of Appeals, February, 1874.

MECHANICS' LIEN.—AMENDMENT.—INFANT.

A mechanics' lien can not be acquired for work or materials furnished under the contract with the equitable owner of the land, as against one holding the legal title, unless the work or labor is furnished by permission of the latter.

If, however, the equitable owner permits the building to be erected, and before notice of lien is filed, he becomes the legal owner by the performance of a contract for its purchase, the conveyance will be held to relate to the time when the contract of purchase was made, and the equitable owner will be deemed to be within the statute.

The provision of the mechanics' lien law of 1863 (ch. 500, p. 859, § 5), that matters of form should be amendable at all times without costs, does not compel the court to allow an amendment of the issues ; for the issues which are to be tried are not matters of form, they are of the substance of the litigation.

Although where an infant is a party, he is entitled to have the necessary amendments of the pleadings allowed to bring his case properly before the court, it is in the discretion of the court or referee to refuse to allow an amendment by an adult setting up the defense that he was an infant at the time of making the alleged contract.

Under the act of 1863, a lien must be shown to have existed at the time of the commencement of the proceedings ; but if jurisdiction is thus established, the court may proceed and determine the entire controversy, and may render a personal judgment after the lien has expired.*

* Compare *Maltby v. Greene*, 3 Abb. Ct. App. Dec. 144.

In *Welcome v. Jones* (*Buffalo Superior Court, General Term, June, 1873*), a stricter construction was given to the act applicable in Buffalo and certain other cities and villages (See Abbott's Dig. 2 ed. vol. 4, p. 334, *note*).

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Under the provision of the statute which permits the filing of a lien within three months after the work is finished or abandoned, if there be an entire work under one contract for all that was done,

Welcome W. Jones and others sought to foreclose a lien they claimed by proceedings against Lucretia F. Walker.

N. Morey, for respondents.

D. F. Day, for appellants.

BY THE COURT.*—SMITH, J.—This is an action originally brought before a justice of the peace of the city of Buffalo, to enforce a mechanics' lien claimed to exist in favor of the plaintiffs for work done, and materials furnished by them for defendant, the owner of a dwelling-house and lot in said city, for repairs upon said house. The plaintiffs had judgment in the court below, for one hundred and thirteen dollars and seventy-five cents and costs, and an appeal was taken to this court, in which a new trial was had which resulted in a verdict for the plaintiffs, and from the judgment rendered thereon, this appeal was taken.

On the trial in the court below as well as in this court, various objections were urged by the appellant to the respondents' right to recover, but one of which, in the view we have taken of the case, is it necessary for us to consider.

The action is brought pursuant to the provisions of chap. 305 of the Laws of 1844, as amended in 1845 and 1851. This statute provides for creating a lien on any building, and the lot on which it stands for any labor performed or materials furnished in building, altering, or repairing such building or its appurtenances, by virtue of a contract with the owner. And the lien is to be secured by the person performing such labor or furnishing such materials, filing in the county clerk's office specifications of the work by him contracted to be performed, or materials to be furnished and stating the price or prices agreed to be paid therefor; or, if the contract is in writing filing a true copy thereof in said office; and serving notice thereof personally on the owner of the building.

On the trial of this cause the plaintiffs in order to establish the lien which they seek to enforce therein, proved that they had duly filed in the county clerk's office specifications stating their claim for labor performed and materials furnished by plaintiffs for defendant,

*Present, CLINTON, Ch. J., SHELDON and SMITH, JJ.

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no part of the work will be regarded as finished until all that was intended in the contract has been performed.

Appeal from a judgment.

amounting to one hundred and eight dollars and fifty cents, "to make the repairs hereinafter mentioned under and in pursuance of an agreement thereto," that the labor was performed and the materials furnished in repairing and painting the defendant's house on the north-east corner of Chestnut and Swan streets, and "that by the terms of the original agreement which was made with us by the said Lucretia F. Walker, said house was to be painted for the sum of one hundred and eighty dollars." The specifications then proceed to state certain extra work not included in said agreement, amounting to twenty-eight dollars and fifty cents, done at defendant's request and for which she agreed to pay, and that defendant had "paid on account of said work and materials the sum of one hundred dollars, leaving a balance unpaid of one hundred and eight dollars and fifty cents," and they conclude with a description of the lot on which the house stands, and the claim of a lien thereon for said sum of one hundred and eight dollars and fifty cents. The plaintiffs also proved due personal service of notice of said specifications, and of the filing thereof on defendant pursuant to the statute.

The plaintiffs further proved that they made an agreement with defendant, to paint the outside of her dwelling-house on the lot described in the specifications, *and the fence on the lot*, three coats, for the sum of one hundred and eighty dollars, that they had performed all the work, that they also performed the extra work claimed to the amount of twenty-eight dollars and fifty cents, that defendant had paid them one hundred dollars on account, and that the balance was unpaid, and rested their case.

The defendant thereupon moved the court to non-suit plaintiffs on the ground that the specifications filed and notice thereof served are insufficient to establish a lien on the defendant's house and lot, inasmuch as they do not specify correctly the work to be done under the contract, no reference being made to the painting of the fence, and the proofs in the case established no lien on the house and lot.

The court denied the motion, to which ruling defendant excepted, and after some testimony for defendant the cause was submitted to the jury, who found a verdict for plaintiffs for one hundred and seventeen dollars and fifty cents, on which judgment was entered, and the defendant brought this appeal.

The court erred in refusing the non-suit asked for. If when the

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The proceedings by which the judgment appealed from was recovered appear fully in the report of the case in the common pleas (16 *Abb. Pr. N. S.*, 397).

action was brought the lien claimed had no existence, the action can not be maintained (*Freeman v. Cram*, 3 *Com.*, 305; *Mushlitt v. Silverman*, 50 *N. Y.*, 360; *Grant v. Vandercook*, 57 *Barb.*, 165; *Huxford v. Bogardus*, 40 *How. Pr. R.*, 94; *Donnelly v. Libby*, 1 *Sweeney*, 259; *Quimby v. Sloan*, 2 *E. D. Smith*, 594; *The People ex rel. Hall v. Lamb*, 3 *Lansing*, 134 and *Colie v. O'Keel*, cited in opinion of court in the last case).

In *Mushlitt v. Silverman*, the court said, "The lien claimed by the plaintiffs is the creation of statute, and depends solely for its validity upon the act creating it. The act is an innovation upon the common law affecting property and rights of property, authorizing as it does property to be incumbered without or against the consent of the owner, and without a resort to legal process or judicial action. Such an act can not be extended in its operation and effect beyond the fair and reasonable import of the words used; and the plaintiffs asserting their lien must bring themselves within its terms and the lien must be shown, not only to have been regular and valid in its inception but to be a continuing and existing lien under the statute."

Let us consider this case with reference to the sound principles thus laid down.

The contract stated in the specifications filed, in the notices served on defendant, and in the complaint in the case, was to *paint defendant's house* for the sum of one hundred and eighty dollars. The contract proved on the trial was to paint defendant's house *and the fence on the lot* for the sum of one hundred and eighty dollars. The contract proved was an entire one embracing the work on both the house and the fence, and the contract price was one round sum, to be paid for the work on both, without any designation of the sum to be paid for either, or any means furnished by the contract itself by which to ascertain what portion of the agreed price was to be paid for the work on the house, as distinguished from the work on the fence. Whether the work on the house or that on the fence was the greater or more expensive does not appear. Nor is it material. Under the proofs in the case, the specifications do not truly state either "the work contracted to be performed," or "the price or prices agreed to be paid therefor," as required by the express terms of the statute. The work contracted for is stated in the specifications to be painting the house, the proof shows it to be painting the house *and fence*; the

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A. J. Requier, for defendant appellant.

A. J. Perry, for plaintiff respondent.

price is stated in the specifications to be one hundred and eighty dollars, for painting the house; the proof shows it was to be one hundred and eighty dollars for painting the house and fence. The plaintiffs failed, therefore, to prove that compliance with the statute which was indispensable to the creation of a lien. The specifications would have been no more defective if they had omitted all reference to the house, and stated the work contracted for to be painting the fence, and the price to be paid therefor the sum of one hundred and eighty dollars.

In cases arising under the mechanics' lien law of Massachusetts, wherein a lien existed for labor performed but none for materials furnished, the supreme court of that state held that if labor and materials had been furnished and used in the erection of a building, under an entire contract, with no stipulation for any separate price for either, and it is impossible to determine what part of the contract price is to be applied to either, and there is no mechanics' lien for the whole, there can be none for a part (*Morrison v. Minot*, 5 *Allen*, 403; *Brewster v. Wyman*, *Id.*, 405). The principle of those cases applies in this. No lien exists or is claimed for the work of painting the fence. Yet it is impossible to determine what part of the contract price should be applied on that work, and it is consequently impossible to fix the amount of the lien for the work on the house. The one hundred dollars paid on account, may have been more than enough to pay for the work on the house, and thus discharge the lien. It is impossible to fix the amount of any lien or to determine judicially that any has existed for the work on the house.

The difference between the contract stated and that proved, is a very material one. Suppose the ordinary action had been brought by plaintiffs for work done and materials used in painting the defendant's house, and on the trial it had been proved that the work was done and materials used under the contract proved in this case, to paint both the house and the fence, for a round price of one hundred and eighty dollars for the entire work, and that plaintiffs had wholly failed and refused to paint the fence, could they have recovered anything in such action? Clearly not (*Glacius v. Black*, 50 *N. Y.*, 145; *Smith v. Brady*, 17 *Id.*, 173).

It is not unjust or inequitable to require parties to comply strictly with the provisions of this statute, in order to acquire its benefits.

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FOLGER, J.—We have read the testimony in this case with care. The motion for the dismissal of the complaint, on the ground that the plaintiff had made no adequate proof that the defendant ever employed him either directly or through an agent, was properly refused by the referee.

Although there was much contradiction of witnesses; and the testimony of the principal witnesses was not in all things self-consistent, yet there was that shown from which the referee had the right to find directly, or as inference, that the plaintiff was employed by the defendant, or by her husband, as her agent.

Nor is there strength in the position, that as the conveyance of the premises was not delivered to the defendant until December 10, 1870, she did not become the owner until then, and that the premises were not subject to a lien for labor and material supplied to her before that date. She was the equitable owner of the premises, by a contract for the purchase thereof, as early as October 6, 1870 (*Rollins v. Cross*, 45 *N. Y.*, 766). We have held that a lien can not be acquired for work and materials furnished under a contract with the equitable owner, as against one holding the legal title unless the work or labor is furnished by permission of the latter. But we further held, that if the equitable owner permits the building to be erected, and before notice of lien filed, by the performance of a contract for purchase become the legal owner, the conveyance will be held to relate to the time when the contract of pur-

Under it rights are claimed which are unknown to the common law, and are created solely by force of the statute. These rights may be enforced in a summary manner, and by proceedings different from those prescribed by the general laws for the enforcement of civil contracts. It is but just, therefore, that parties invoking the aid of such a statute should bring themselves strictly within its terms. This the plaintiffs have failed to do, and the judgment in their favor must be reversed, and a new trial granted, costs to abide the event.

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chase was made, and such equitable owner to be within the statute. The facts of this case bring the defendant within the principle of that decision for all work and material furnished after the execution of the contract of sale.

I do not perceive that the referee made the error claimed by the defendant in his sixth point. It is true that Bramhall did authorize Godfrey to employ the plaintiff; but it was for a certain quantity of work specified and limited by him. It appears that the referee has deducted from the amount of the bill rendered by the plaintiff the second and third items thereof. It is probable from the testimony that this was the work ordered by Bramhall, and that this was all that he ordered.

There was no error prejudicial to the defendant in refusing the first amendment to the answer asked for by her counsel. He asked to amend by adding a denial that she was the owner of the house during the period from September 16 to December 10, 1870. Though the amendment was not granted, yet evidence was received which showed the exact status of the defendant for that space of time. The contract under which she became vendee was put in evidence, and all extensions of time for performance indorsed upon it. So was the deed to her delivered in performance of the contract of sale, and proof of the day of delivery of it. Besides that, though the act under which the proceedings were instituted (act of 1863, ch. 500, p. 859, sec. 5) says that the court shall proceed without regard to matters of form which shall be amenable at all times without costs while the proceedings progress, yet the issues which are to be tried are not matters of form; they are of the substance of the litigation. The Revised Statutes and the Code of Procedure are very liberal in the power of amendments of pleadings which they give, yet it has always been held that it was not an abuse of the dis-

cretionary power of the court to refuse an amendment of the pleadings which would introduce an entirely different cause of action or defense. And though they use the word "may," while this act uses the word "shall" in giving the power of amendment, this difference of phraseology does not alter the discretionary power of the court. For this reason the referee was not in error in refusing the second amendment asked by the defendant.

Had it been formally suggested to him in her behalf, that she was an infant at the time of the trial, it would have been his duty, in accordance with the principles of the case cited by the learned counsel for her in this court, to have allowed such action as that fact demanded, so that she should be properly before the court. But there was no suggestion of such fact presented with verification, nor did the somewhat incongruous amendment proposed indicate that she was then nor at the commencement of the proceedings against her, a minor, and so improperly brought into court in person and not represented and defended by guardian *ad litem*; if there be practice for appointing such guardian for a minor, in proceedings under the act of 1863, which we will not now stop to inquire. From the language of the amendment proposed it would seem that she had attained her majority. For it avers that since attaining her majority she has not ratified any alleged contract. The proposed amendment was then to set up infancy existing at the time of contracting for the work and material. This, too, it was in the discretion of the referee to refuse, as introducing an entirely new defense.

The defendant makes the point that, as the lien had expired before the referee made his report, there was no authority to render a personal judgment. It has been so held under statutes differing from this of 1863. There are provisions in this act which make a different

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conclusion necessary. The second section provides that all persons having liens, in order to enforce the same, shall prove their demands in the same manner as in ordinary proceedings at law, and shall have relief according to their rights as they appear in evidence. Judgment is to be rendered according to the equity and justice of the claims of the respective parties among themselves, and against any owner, and so as to determine the rights of all parties and the amount due to each (§§ 5 and 7). It is declared that the contractor and the owner shall be personally liable to the lienor (§ 9). The same section provides that judgment may be enforced by execution, and the property on which the lien is adjudged to rest may be sold thereunder, and personal liability may be enforced against the property of any person against whom a personal judgment may have been rendered. These provisions, beyond question, contemplate the proving of demands, the giving judgment for them against the contractor or the owner personally, and issuing an execution thereon against any leviable property of the judgment debtor.

There must be shown to be a lien existing at the time of the commencement of the proceedings. It is thus only that the court obtains jurisdiction. It thus acquires jurisdiction of the subject-matter and of the person, and then it may determine the entire controversy. It does not lose its jurisdiction of the whole matter, because from the length of time for which the proceedings have been pending, the lien, upon the existence of which the jurisdiction at first was based, has ceased. The whole case is before the court, and it may proceed to give judgment upon the merits. It was so in the court of chancery. When it had acquired cognizance of a suit for the purpose of discovery or injunction, it would, in most cases of account, when in full possession of the merits and with sufficient materials before it, retain the suit in order to do complete justice between

the parties, and to prevent useless litigation and expense (*Armstrong v. Gilchrist*, 2 *Johns. Cas.*, 424, and note in *Shepard's Ed.*). This rule had the limitation, that it must be a case in which the court of chancery could properly proceed to a judgment, *i. e.*, where the assistance of a jury was not necessary. In a court which has powers at law, this limitation can seldom apply.

The objection of the defendant, however, goes farther than this. She claims that there is no proof that the labor and materials were all done and furnished within three months before the filing of the lien, and as to that portion thereof without the three months, there was at no time a lien, and being no lien, no jurisdiction acquired by the court as to that, and hence no power to give judgment thereon.

This point does not seem to have been raised before the referee. There is no exception to the report, which specially raises the question. The answer of the defendant, the course of the trial, and the exceptions to the report, show that the defense made was upon the ground that the defendant never employed the plaintiff, and was, therefore, under no liability to him. The motion to dismiss the complaint presents grounds therefor, but neither of them is that taken for this point. The referee has found, as a conclusion of law, that the plaintiff had a lien for the amount which the referee found, as a conclusion of fact, was due to him. He has found, as facts, that he did work and furnished materials to that amount, and has found no other facts which, with the evidence in the case, tend to show that there was but one hiring, and that the work and materials furnished was under one contract, and was one continuous performance. It appeared that the work and materials furnished was by piecemeal, and by different successive contracts, so that at the end of each plaintiff had performed his agreement and had a right

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of action therefor, the claim of defendant, that the time of filing his lien *pro tanto* had expired, would have some foundation. But this does not appear. Indeed, Godfrey testifies that he had a conversation with the plaintiff, in which he asked the latter what it would cost to do the work. This, it is inferable, was before the work was done, and in contemplation of all that was to be done and of all that was done, and gives basis for the inference that it was one bargain. If so, then the plaintiff was within the provision of the statute, which permits the filing of a lien within three months after the work is finished or abandoned. If it was an entire work under one contract for all that was done, there was no finishing of it until all that was intended in the contract was performed. Had the point now made been raised before the referee, other evidence might have been produced; his findings would have been more specific, and his conclusions of law might have been different, or they might have been more fully sustained by the findings of fact. As it is, we are not able to say that the point made by the defendant is well taken.

The judgment appealed from should therefore be affirmed, with costs.

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HOAG *against* LAMONT.[Reversing in part 16 *Abb. Pr. N. S.* 91.]*Court of Appeals, 1875.*

JURISDICTION.—BROOKLYN CITY COURT.

In an action against several joint debtors brought in the city court of Brooklyn, the fact that one defendant resided within and was served within the city of Brooklyn, does not give the court jurisdiction as against the others.

There is no legal efficacy in the joint liability of several debtors which gives an actual or constructive jurisdiction over the persons of those without the jurisdiction by the means of service upon one who resides within the jurisdiction.

In such case, it is only the debtor who is resident and served within the jurisdiction who will be bound by the judgment.

In an action against the trustees of a manufacturing company, to hold them individually liable for debts of the company, the plaintiff may recover against one or more severally.

The facts of this case are fully reported at p. 91 of this volume.

S. J. Glassey, for appellants.

Erastus New, for respondents.

BY THE COURT.—ALLEN, J.—The judgment against the defendants other than Walbridge, can not be sustained without substantially overruling *Landers v. Staten Island R. R. Co.* (53 *N. Y.*, 450). The cause of action did not arise within the city of Brooklyn or the county of Kings, and there was no claim upon the trial that either of the defendants except Walbridge had

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any time resided, or that they had been served with process within that city or county. The jurisdiction of the court was made to rest, and was sustained by the city court upon the fact that Walbridge, one of the defendants, at the time of the commencement of the action, resided in the city of Brooklyn. The trial judge submitted the case to the jury upon the theory, that when two or more are jointly liable on a contract, and one of them resided within the city, the others could be served with process at any place within the state, but if none resided within the city they were not amenable to the jurisdiction of the court, unless served with process within its jurisdiction. The verdict passed against all the defendants, and the judgment was given following the verdict, upon the sole ground that the residence of one of the defendants within the city of Brooklyn gave jurisdiction to the court over all, and that process could be served in any part of the state upon the other defendants. This is entirely inconsistent with *Lander's* case. The jurisdiction of a strictly local court, as the city court of Brooklyn is, can not be extended to persons and subjects without the jurisdiction by the mere circumstance that some one or more of those jointly liable chance to reside or be within the jurisdiction. Vitality and effect can not be given to the process of the court beyond the territorial limits of the jurisdiction, merely because there are some of the joint obligors or parties liable within those limits, and subject to its process. There is no legal efficacy in the joint liability of several debtors which can give an actual or constructive jurisdiction over the persons of those without the jurisdiction, or make the court one of general jurisdiction, when these circumstances, to wit, a joint liability of several, and the residence of some within, and of others without the jurisdiction concur. It would no longer be a local court if its jurisdiction could be enlarged by such a coincidence of circum-

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stances. The court in *Landers v. Staten Island R. R. Co.*, *supra*, decided that the legislature could not change the character of the city court of Brooklyn from that of a local court of limited territorial jurisdiction to one of general jurisdiction with power to summon to its bar and subject to its judicial authority those not resident or served with process within the limits of its jurisdiction as a local court. The constitution does not permit an enlargement of its jurisdiction as to persons, so as to give it power to send its process for the commencement of actions beyond the county of Kings. So far as the act of 1871 (ch. 282), which is relied upon to uphold the judgment, attempts to extend the jurisdiction to parties residing without the county of Kings by reason of the residence of other parties, or the service of process upon some of the defendants within the county of Kings, it is unauthorized by the constitution. The question was so fully considered in the *Lander* case that it is not deemed necessary to review or extend the discussion at this time. In case of a joint debt or obligation, if one of the joint debtors should reside or be served with process within the jurisdiction of the court, it may well be that the action might proceed to judgment under the joint debtor act, and a recovery be had in form against all, but which should affect only the individual property of the defendant served with process and the property owned jointly by all (*Code*, § 136, sub. 1).

That question is not before us. The judgment did proceed upon that ground, and was not in the form authorized by that statute. The liability sought to be established was not joint. It was either joint or several, as the plaintiff might elect to sue one or all, or as one or all might be served with process. The trustees of a manufacturing corporation are made jointly and severally liable for the debts of the company, by the omission to make the annual report required by statute

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(*Laws* of 1848, ch. 40, §, 12). As the defendants were severally as well as jointly liable, it was a proper case for a several judgment against Walbridge if a case was made for a recovery against him, but the judgment must be reversed as to the others for want of jurisdiction, and the error in the charge upon that question (*Code*, § 136, sub. 2; *Id.* § 12). It does not detract from the usefulness of the court or its character to confine it in the exercise of its jurisdiction within the constitutional limits. It is an important and efficient tribunal in the city of Brooklyn, and by its ability and despatch attracts to it much of the important and difficult litigation of that city, and the importance of the questions or the amounts litigated before it are not second to those which come before any court of the state. Its creation was the result of the necessity of a local court of a high character.

It only remains to consider the liability of Walbridge upon the merits. As the jury have found that he was a resident of the city of Brooklyn, and he did not in his answer make any question as to the jurisdiction, the judgment must be affirmed as to him, unless error was committed to his prejudice upon the trial. The action is brought for the recovery of moneys claimed to be due upon an agreement alleged to have been made with the American and European Crystallized Egg Company in August, 1870, by which the company employed Crandal and Pryer as agents to sell certain quantities of the egg prepared by the corporation, and agreed to furnish them with certain quantities during the three months beginning with October, 1870, for sale on a commission of two and a half cents per pound, and in case of a failure to deliver the egg, to pay the commission as upon a sale. The plaintiff avers a failure of the company to deliver the egg, and an assignment of the claim for the commission to him. Upon the trial it was proved that the corporation was

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formed on August 5, 1870, for the manufacture or preparation of crystallized egg, under a patent to the defendant Lamont, and that the defendants were trustees named in the articles of association, and that no report had been made and filed by the corporation, as required by statute. It was also proved that prior to the incorporation of the company, and in April, 1870, a written agreement was made between Lamont, professing to act for himself, the defendant Andrews, and one Hiram Walbridge, afterwards the president of the company and since deceased, and Crandal and Pryer, by which Lamont agreed that Crandal and Pryer should be the sole authorized agents of any firm, association, or company then formed, and thereafter to be formed for the purpose of manufactuing and selling crystallized or dessicated egg under his patent, for the sale of such egg so manufactured and sold within the states of New York and New Jersey, to the amount of two hundred and seventy-five thousand pounds ; Crandal and Pryer to receive a commission of two and a half cents per pound on the first one hundred thousand pounds, and one per cent. on the next one hundred and seventy-five thousand pounds sold by them. After certain stipulations as to the place and mode of transacting business, Lamont agreed that the said firm, association, or company should deliver to Crandal and Pryer thirty thousand pounds of egg during the quarter commencing July 1, thereafter, and forty thousand pounds during each of the three ensuing quarters, or pay to them the commissions as agreed upon those quantities, and Crandal and Pryer agreed to receive and pay for the egg at the regular market rates during the periods named. Lamont and the persons whom he proposed to represent in this agreement were members and trustees of the corporation then formed, Walbridge becoming the president, Andrews the secretary, and Lamont the treasurer. No proof was given or attempted to be

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given of any other or different contract or agreement than that made with Lamont; but it was sought to prove that the corporation had assumed the contract and taken the place of Lamont in it, and thus became liable to the other parties to it for the performance of all its stipulations. The principal witness for the plaintiff was Crandal, who testified that he had desk-room in the office of the company after its organization, and that before that time he had acted under the agreement with Lamont; that Andrews told him of the organization of the company, its trustees and officers, and ordered him and Pryer to get out cards and go to business for the company, and that he corrected the proof of the cards on which was the name of the corporation and the amount of its capital, the names of the president and secretary, and the names of Pryer and Crandal "authorized agents," and the street and number of their office. He also spoke of having been present at a number of meetings of the officers of the company at the rooms of president Walbridge, who was in poor health, but no evidence was given of any action by the officers of the company on these occasions. The witness, under objection and exception by the defendants, testified to a conversation with Walbridge, the president, in which the latter stated that the company had adopted the contract to which he was a party before, and when compensation was spoken of, Mr. Walbridge said: "The company will pay you your compensation when the quarter is out; don't be alarmed; go about your business, and do your best." That after that conversation, at his request Andrews addressed him and his associate a letter, dated August 23, 1870, not signed as secretary, but individually, stating as in answer to an inquiry as to the payment of their commission as agents of the corporation under agreement held by them, that by the terms of the agreement their commission, amounting to seven

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hundred and fifty dollars, would become due on the last day of September, then next, for the quarter preceding that date. The witness further stated, that on the first of October, himself and Pryer called on President Walbridge for the money due them, and he offered them his note, and after advising with counsel, they indicated a preference for Mr. Hulburd's note, and Lamont went with them to the office of Hulburd, and procured his note for seven hundred fifty dollars, and gave it to them, upon which they obtained the money. They had no conversation with Hulburd upon that occasion, and Hulburd and Lamont proved the consideration of that note to have been an indebtedness from the former to the latter for stock in the corporation purchased of Lamont, and there is no evidence that Hulburd had any knowledge at the time of the transfer of the note to Crandal and Pryer, or that the note was intended for them, or that he knew of the contract between them and Lamont. The same witness testified to a negotiation in which Walbridge, Hulburd, Lamont and Andrews took part, for the sale of the products of the company in Europe by Crandal and Pryer, and that after much conversation it was proposed by Hulburd and Walbridge that Andrews should prepare a proposition, to be submitted by C. & P. to the company, and this was afterwards done. The arrangement was consummated, but the proposition contained a clause to the effect that their contract as the company's authorized agents for New York and New Jersey should be transferred for the time of their absence to some good man to be approved by the company. The same witness also proved that after the organization of the company, he and his associate Pryer had their desk and place of business at the office of the company, and were in constant communication with the manager and general business man of the corporation, Mr. Lamont the treasurer, and acting under his advice and direction, and his general and

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repeated assurances that the contract would be performed by the company and the egg furnished as agreed, and that they omitted to abandon the arrangement and seek other employment at his urgent solicitation and assurances that the egg should be ready at an early day, and that the company would pay the commission when the quarter was out. This evidence was all legitimate, and it can not be said that there was no evidence tending to prove the principal fact alleged and in issue, viz., the employment of the plaintiff's assignors by the corporation upon the terms of the contract with Lamont.

The declarations and the acts of the parties, especially the acts and declarations of the officers and managers of the corporation after its formation, and upon the faith of which Crandal and Pryer acted, were competent to prove that the company had adopted the contract of Lamont and consented to employ those parties upon the terms therein specified.

The judge at the trial fairly submitted the questions of fact to the jury, and the verdict is final in this court, there being competent evidence in support of it. The employment of the agents was not required to be in writing or by formal resolution. Neither the corporate seal, nor a formal resolution of the managers is necessary to the making of a valid contract by a corporation, and the defendant's counsel were not entitled to the instructions asked in that respect.

The declarations of Walbridge, the president of the company, in a matter affecting the business of the corporation, and in respect to which he was acting for it, would have been admissible as evidence against the company to establish its liability, and were, therefore, competent against the defendants to prove the obligation and indebtedness of the company.

The judgment against Walbridge must be affirmed, with costs, and the judgment as to the other defendants

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must be reversed, and a new trial granted, costs to abide the event.

All concurred, except MILLER, J., who took no part.

GREAVES *against* GOUGE.

Supreme Court, First District; Special Term, January, 1875.

CAUSE OF ACTION.—LIABILITY OF CORPORATE OFFICER.

An action does not lie, by a stockholder in a corporation, against an officer thereof, to recover damages for the act of the officer in fraudulently abstracting the corporate funds whereby the declaring of dividends was prevented.

The proper remedy is an action against the officer, to which also the corporation should be a party, upon allegations that the corporation, when requested by the stockholders, had refused to bring such an action.

Demurrer to complaint.

W. T. B. Milliken, for plaintiff.

Oscar Frisbie, for defendant.

VAN VORST, J.—The several acts of the defendant, and which are all alleged in the complaint to have been illegally and fraudulently committed, were injuries

directly to the corporation, of which defendant was president, and in which plaintiff was a stockholder.

They consist of the conversion by the defendant to his own use, of the whole surplus earnings of the corporation, the illegal appropriation to himself of its funds to the amount of four thousand dollars a year, since the corporation was formed ; the further appropriation to himself and to his own individual use, and that illegally, of personal property and chattels of the corporation ; the payment with corporate funds, for work and labor rendered for his individual benefit, and the pledging of the credit of the corporation, and the use of its funds and notes for his own, and not the company's advantage.

This property, which has been illegally and fraudulently converted, and these moneys and credits which have been misapplied, belonged to the corporation, and this infidelity in office on the part of the defendant, and which resulted in substantial injury to the corporation, was in disregard of the duty he owed it, as its president and one of its trustees.

To the corporation the defendant is directly responsible, and an action for the recovery of these moneys and for damages, the consequences of his illegal acts, could be maintained against him by the corporation. And if this property can be restored and these moneys and damages be recovered by the corporation, the value of the plaintiff's interest in the corporation will be repaired.

The plaintiff alleges in his complaint that these illegal and fraudulent acts of the defendant have rendered his stock, which was formerly valuable, of no value.

The injury which the plaintiff has sustained, in the depreciation of his stock, proceeds in fact from the abstraction, and diminution of the corporate property, and assets.

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Could the corporation be made whole, the plaintiff would be made whole.

This action is not brought in the interest of the corporation, nor for the recovery of its property, nor its restoration.

Nor could such action be maintained in the name of the plaintiff, although he is a stockholder, in the forms in which this action is instituted.

An action for such purpose should be in the name of the corporation, but if the corporation, or its officers, should refuse, on the application of the stockholders to bring such action, it might be brought by a stockholder, for the benefit of himself and others similarly situated, and in such case the corporation should be made a defendant.

No case has been adduced by the counsel for the plaintiff, which is a direct authority for the support of an action by a stockholder to recover at law damages which he claims to have individually sustained, through the depreciation of the value of his stock, by a misappropriation or conversion of corporate property by a trustee.

On the other hand *Smith v. Hurd* (12 *Metc.*, 371), decides that no such action can be maintained. *SHAW*, Ch. J., says: "We are not aware that any similar action has been sustained in England or in any of the courts of this country." He further adds: "To the corporation, and body politic, having a separate existence, as a distinct person in law, in whom the whole stock and property are vested, all agents, debtors, officers and servants, are responsible for all contracts, express or implied, made in reference to such capital, and for all torts and injuries diminishing or impairing it."

This subject had a careful consideration in *Gardiner v. Pollard et al.* in the superior court (10 *Bosw.*, 674).

That action was brought by a stockholder, to recover

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damages for alleged acts of the defendants, whereby his stock in the corporation of which the defendants were trustees, had been rendered valueless, and he deprived of dividends which he would have otherwise received to a large amount.

The misconduct imputed to some or all of the defendants, and which it was alleged caused the injury, consisted in the receipt by Pollard, and the wrongful appropriation to his own use and that of the other defendants, of the net income of the property of the corporation, to the amount of one hundred and fifty thousand dollars.

It was alleged that a conspiracy had been formed by the defendants to embezzle the income of the company, and to defraud the plaintiff of the value of his stock and of the dividends thereon.

A demurrer was interposed to the complaint, and BOSWORTH, Ch. J., in a well considered opinion at special term sustained the demurrer. He says: "The corporation is the only party that can properly sue. If it refuse, then a stockholder on an allegation of that fact, may sue on behalf of himself and other stockholders, and make the corporation a party defendant. The complaint is defective in substance, in that the suit is neither brought by the corporation, nor is it made a defendant on an allegation showing the necessity therefor."

At general term the ruling of Justice BOSWORTH was affirmed.

In *Cazeaux v. Mali* (25 Barb., 578), in this court, the directors of a corporation were held to be liable directly to a stockholder, for their fraudulent acts, through which his stock had been rendered valueless.

One act complained of was a fraudulent issue, by the directors, of *spurious stock*, by reason of which the stockholder claimed to have sustained individual damage. Another ground of complaint and damage was,

that the plaintiff purchased eight hundred shares of the spurious stock, believing it to be genuine. As the corporation was not bound to recognize this spurious stock, it added nothing to its liabilities, and was no true source of injury to the corporate property, and gave the holders thereof no claim against the corporation.

And the cause of action, in such case, would be in favor of the stockholder who had sustained the injury, against the injuring directors.

The court held that the injury was peculiar to the stockholder.

Crook v. Jewett (12 *How. Pr.*, 19), was a motion to vacate an order of arrest. The contents of the affidavit upon which the defendants were arrested are stated in the opinion. There had been in the case an embezzlement of corporate property by the directors, and also a fraudulent issue of spurious stock. The motion to vacate the order of arrest was denied.

I do not think that that case, if urged as an authority to support the present action, can for the reasons above stated be sustained. Had the question arisen on a demurrer, for the non-joinder of the corporation as a party, the result would have probably been, that the demurrer would have been held to be well taken, as to the causes of action, except for the issue of spurious stock.

In *Robinson v. Smith* (3 *Paige*, 222), the chancellor says: "The directors are the trustees or managing partners, and the stockholders are *cestui que trusts*, and have a joint interest in all the property and effects of the corporation. And no injury the stockholders may sustain, by a fraudulent breach of trust, can, upon the general principles of equity, be suffered to pass without a remedy."

But in such action, the chancellor held, that the corporation should be before the court as complainant or as a defendant.

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Cunningham v. Pell (5 *Paige*, 607) is to the same effect.

In this action the injury the plaintiff claims to have sustained is the direct consequence of the depleted and weakened condition of the corporation, through the abstraction by the defendant of its funds and property. The proximate cause of his damage, is the diminished assets of the corporation.

The allegation that the directors had fraudulently prevented the declaring of dividends, is only another statement for the abstraction of the surplus funds, through which such end was accomplished.

This action can not be sustained as one to recover peculiar damages by the plaintiff sustained, as the complaint does not sufficiently allege any loss to himself proceeding from the acts of the defendant, except through the abstraction and conversion of corporate property. Nor does it aid the complaint, that provision is made therein for the intervening of other stockholders, should they so elect.

If it be to recover his peculiar damage, other stockholders can not properly intervene, as they have no interest in the plaintiff's recovery for his individual loss.

To be upheld as an action to obtain appropriate redress for the fraudulent acts of the defendant, in conjunction with other directors and trustees, by which the corporation has sustained loss and damage, the complaint is defective in that the corporation is not made a party defendant, with appropriate allegations, that upon application by the stockholders it had refused to bring an action, and was therefore made a defendant.

There should be judgment for the defendant on the demurrer, with costs.

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HARTNETT *against* WANDELL.

[Affirming 16 *Abb. Pr. N. S.* 9, and reversing 2 *Hun.* 552; S. C., 5 *Supreme Court*, 98.]

Court of Appeals, April, 1875.

A testator may delegate to the executor designated in his will the power to name a co-executor.

The provision of 2 *R. S.* 69, § 1, to the effect that the surrogate shall issue letters to the persons "named" in the will as executors, does not preclude him from issuing letters to one not expressly named in the will, but duly designated by virtue of such a power.

The provision of 2 *R. S.* 221, § 1, that the power of the surrogate shall be exercised in the manner prescribed by law, is not jurisdictional, except in respect to the prescriptions of statute as to the mode of acquiring jurisdiction; as a regulation of practice, when the surrogate has acquired jurisdiction the provision is modal.

Neither a literal nor technical construction inconsistent with the general purpose of the law or well established principles affecting the administration of estates and the operation and execution of wills, should be given to the statutes which only affect the mode of procedure in the surrogate's court.

On June 10, 1873, Andrew Alexander made and published his last will and testament. By that will, after providing for the payment of his debts, he gave all his property to his wife, Mary E. Alexander.

The last clause of the will is as follows:

"Lastly, I hereby nominate and appoint my said wife the executrix of this my will, hereby revoking all former wills by me made, *and request that such male friend as she may desire shall be appointed with her as co-executor.*"

The will was duly proved before Peter A. Rogers, surrogate of Albany county, and letters testamentary

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thereon were issued to Mary E. Alexander, as executrix.

Subsequently said Mary E. Alexander filed a petition in which she recited the above provision of the will, and prayed that Stephen S. Wandell might be joined with her as co-executor.

Accordingly, on March 2, 1874, the surrogate issued letters testamentary to said Wandell as co-executor, to act in conjunction with Mary E. Alexander, said executrix.

On April 4, 1874, Daniel Hartnett, and nine other creditors of Andrew Alexander, deceased, presented their petition to said surrogate, in which they alleged that they were creditors of the estate; that the former letters had been issued to Mrs. Alexander; that letters were afterward issued to Mr. Wandell, and they "respectfully suggested" that these last letters were issued without due consideration, and contrary to law, and prayed that they might be revoked.

After hearing the parties, the surrogate refused to revoke the said letters (see his opinion, p. 9 of this volume), and the creditors appealed to the general term, where the order of the surrogate was reversed, with costs of appeal against said Wandell personally (2 *Hun.* 552, 5 *N. Y. Supreme Court Rep.*, 98), and the executor appealed to the court of appeals from the decision of the general term.

Esek Cowen, for the appellant.

Robert H. McClellan, for the respondent.

ALLEN, J.—The sole question presented upon this appeal is as to the right of the appellant in the absence of any objection to his personal fitness and qualifications to receive from the surrogate of Albany county letters testamentary as a co-executor with Mrs.

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Alexander, of the last will and testament of her husband, Andrew Alexander, deceased. The right and the power of a testator to provide for the due execution of his will, and the administration of his estate by a person not designated by name, that is, literally "named" by him, is the important question. Those who controvert the power of a testator to provide for the execution of his will by a delegation of the power of naming an executor to another, or in any way, except by a direct appointment of an executor, rest their objections upon the supposed limited jurisdiction of the surrogate's court, and more especially upon the rules of practice prescribed for that magistrate, and the court over which he presides by statute. In so doing they make the tribunal established as a means for giving effect to, and carrying out the will superior to, and the means of defeating the will, and merely because the statute regulating the practice of the surrogate's court has not, as it is thought, provided in terms for precisely the case, and some of its provisions are not applicable in all respects to it.

The will before us is very brief and very direct. The testator directs the payment of his debts out of his personal estate; gives and devises the residue of his property, real and personal, to his wife, constitutes her the executrix of his will, and requests "that such male friend as she may desire, shall be appointed with her as executor." This is the entire will. It is a model instrument, but it is insisted that the last clause is invalid and incapable of execution under the statutes of this state, and these proceedings were instituted to annul an appointment of a co-executor, made in pursuance of the request therein made.

The power of a testator over his estate, the care and management as well as the ultimate disposition and distribution of it is unqualified and absolute, save only as restricted and limited by statute. The princi-

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pal limitations have respect to the statutes of uses and trusts, and the law against perpetuities and unauthorized accumulations. Within the limits, and for the time allowed by law, a testator may commit the administration of his estate and the care of his property to such individuals, or successors of individuals selected by himself, or to be designated by others, as he pleases. As he can dispose of the whole estate, he may dispose of the naked custody and management of it for a limited period, and the disposal, whether for a temporary purpose or otherwise, may be, except as prohibited by statute, absolute or provisional and conditional, or as others designated by him may from time to time direct. The clause of the will providing for a joint administration of the estate by the wife and a male friend to be selected by her is not in conflict with any law, operative upon or affecting the power of one competent to make a will. A will not inconsistent with law, gives the law for the custody and administration as well as the ultimate disposal of property.

The sole difficulty suggested, and which by the supreme court was deemed insuperable, is that the surrogate can not by the strict letter of the law defining his powers, prescribing his duties, and regulating the method of their performance, authenticate the powers of those to whom the testator would commit the execution of the will. But the authority of the executors is derived from the will, and not from the letters testamentary issued by the surrogate. The latter are but the authentic evidences of the power conferred by the will, and are founded upon the probate of that instrument. It is true that by the statutes of this state executors are not permitted to exercise their powers except to a very limited extent, until proof of the will, and the granting of letters testamentary (2 R. S. 71, § 16). But this does not affect the character of the office, or detract from the efficacy

of the will, as the source of the power. An executor derives power from the will, but an administrator owes his to the appointment of the surrogate (*Lovell on Wills*, 382, *et seq.*). An executor can derive his office from a testamentary appointment only (1 *Williams on Executors*, 200, and note *a*). The appointment may be either express or constructive, and it may be an immediate designation or an appointment by others by authority of the will. Mr. Williams, in his treatise on the law of executors, says: "Although no executor be expressly nominated in the will by the word executor, yet, if by any word or circumlocution, the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors" (1 *Williams on Executors*, 209). The proposition is abundantly sustained by authority. The rule grows out of the fundamental principle, universally recognized, that effect shall be given to the will of a testator, when not contrary to the rules of law as such will, and the intent of the author of it can be gathered from the whole instrument (3 *Redfield on Wills*, 2d ed., 70; *Carpenter v. Cameron*, 7 *Watts*. 51).

Bayeaux v. Bayeaux (8 *Paige*. 333) is an example of an appointment of an executrix by implication, or according to the tenor. The chancellor adjudged every part of the will void, for the reason that it was so inartificially drawn that it was impossible to ascertain the intention of the testator, except as to the appointment of an executor. The testator did not in terms nominate his wife as executrix, but by one clause of the will he appointed Jonas C. Heartt as sole executor, in the event of the death of his wife, during the minority of his children, and from this and other clauses the chancellor concluded that the wife was by implication appointed executrix, and the will to that

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extent was established, and it was adjudged that the wife was entitled to letters testamentary.

The courts have gone great lengths in giving effect to wills designating, or authorizing the designation of executors. When the executor has been expressly named in the will, another executor has been admitted, according to the tenor, to probate jointly with him who is named in the will as executor (*Grant v. Leslie*, 3 *Phillim*, 116; *Powell v. Stratford*, cited *Id.*, 118). When an executor was expressly nominated for general purposes, another person has been held to be executor, according to the tenor, for limited purposes (*Lynch v. Bellew*, *Id.*, 424). Executors may be appointed with separate functions, or to succeed each other in the event that those first named shall die, become incapacitated, or unwilling longer to serve; or two persons may be appointed to act for a definite period, or during the minority, or during the absence from the country of one appointed executor (3 *Redfield on Wills*, 53; *Anon, Dyer*, 4 *a*; *Carte v. Carte*, 3 *Atk.*, 174, 180; *Pemberton v. Cony, Croke, Eliz.*, 164; *In re goods of Wilmot*, 2 *Robertson*, 579; *In re goods of Langford*, L. R., 1 *P. & D.* 458; *Brightman v. Keighley, Croke, Eliz.*, 43). Different executors may be appointed for different states and countries (*Despard v. Churchill*, 53 *N. Y.*, 192).

These and numerous other cases that might be cited, are only referred to as showing the great liberality which the courts have exercised in committing the execution of wills to those indicated in any manner by the will, and in accordance with the intent of the testator, and so as not to disappoint his wishes, regardless of technicalities. The practice of the courts has been accommodated to the will, rather than the will made to give way to technical forms and modes of procedure. In England, probate was granted as executor to persons chosen by the legatees, pursuant

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to the wills of the testator, directing them to appoint two persons to execute his testamentary bequests (*In re Cringan*, 1 *Hagg. Ecc.* 548). By the ecclesiastical courts, letters testamentary are granted to persons as executors who are named for that purpose by those appointed in the will with that power (*In re Ryder*, 2 *Sw. & Tr.*, 127; *In re goods of Deichman*, 3 *Curteis*, 123; *Jackson v. Paulet*, 2 *Robertson*, 344). This practice is not in pursuance of any statutes, and does not grow out of the peculiar organization of those courts, or the forms and modes of procedure therein, but is exercised in the administration of the general laws of the realm; and to effectuate the wills of those competent to dispose of their property by will. The letters testamentary are granted in such cases of legal right, and the rights of the claimants are adjudged upon the same principles as would control in the common law or equity courts of the realm, should the same questions arise and be presented for adjudication in those courts. The validity of an appointment of an executor under a delegation of power has been affirmed by the courts in Delaware. By a will made in the state of Delaware by a citizen of that state, the testator, in the event of the executor named by him relinquishing the trust, authorized the orphans' court of the city and county of Philadelphia to name a suitable person as executor. Upon the relinquishment of the trust by the executor appointed by the will, the orphans' court named a person for the office, and letters testamentary were issued to the nominee by the register of New Castle county. The court held that he was the executor of the will, and that letters testamentary were properly issued to him, instead of letters of administration with the will annexed (*The State v. Rogers*, 1 *Houston [Delaware] Rep.*, 569). That the power delegated to the executrix to nominate a male friend to be a co-executor with her is not in excess of the power of the

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testator over his estate, and its administration after his death, or to provide a suitable agency for the execution of his testamentary bequests, can not well be controverted. It is not inhibited by any statute of the state, is recognized by the common law, and is not violative of any principle of public policy.

It remains to inquire whether by a reasonable interpretation of the statutes regulating the probate of wills and the procedure in surrogates' courts, the powers of testators have been curtailed and the jurisdiction and patronage of surrogates enlarged. The jurisdiction of the surrogate is declared in general terms, and so far as need be referred to here, he has jurisdiction to hold a court. 1st. To take proof of wills of real and personal estate in the cases prescribed by law. 2d. To grant letters testamentary and of administration (2 *R. S.* 220, § 1). His jurisdiction to take proof of the will of the decedent is conceded, and the power to grant letters testamentary is general and not restricted by this section to a grant to any particular person or persons. He may grant them unless restrained by some other statute to executors expressly named in the will, or according to the tenor, or to any person entitled to them by law, and the common law prevails except as modified by statute. The last paragraph of the section declaring that the powers conferred shall be exercised in the cases, and in the manner prescribed by the statutes of the state, does not limit or restrict the jurisdiction, or qualify the general terms of the statutes conferring the jurisdiction and defining the powers of the surrogates. The "cases" in which he has jurisdiction, and the circumstances upon which his jurisdiction depends in taking the proof of wills, are stated and declared by chap. 460 of the laws of 1837 (4 *Stats. at Large*, 486, § 1). The right to grant letters testamentary follows the probate of the will. There was no defect in the jurisdiction

of the surrogate of Albany county to take proof of the will of the deceased, and grant letters testamentary thereon. It was one of the "cases" in which he had jurisdiction. The surrogate must keep himself strictly within the limits of his jurisdiction and the power conferred; that is, he must have jurisdiction of the subject-matter, and of the persons. His jurisdiction of the subject-matter depends upon the facts, and he can only acquire jurisdiction of persons in the manner and by the process prescribed by law. That part of the act which declares that he shall exercise the powers conferred in the manner prescribed by law, is not jurisdictional unless it is restricted in its operation to the manner of acquiring jurisdiction by citation or other process, or by proof of the facts upon which jurisdiction depends, as the case may be. As a regulation of practice, when the surrogate has jurisdiction, it is modal, and does not affect the powers of the magistrate. A substantial compliance with the statutes would satisfy the act, and the statutes regulating the mode of procedure, like all rules of practice, should be liberally construed in furtherance of justice, and to give effect to the legal intent of testators. Neither a literal nor technical construction inconsistent with the general purpose of the law, or well-established principles affecting the administration of estates and the operation and execution of wills, should be given to the statutes only affecting the mode of procedure in surrogate's court.

Stress is laid upon the statute regulating the granting of letters testamentary, and which enact that the surrogate who takes the proof of a will of personal estate shall issue letters testamentary thereon "to the persons named therein as executors," who are competent by law to serve as such, and who shall appear and qualify (2 R. S., 69, § 1). A strict reading of the statute would restrict the issuing of letters to those

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literally "named," that is, designated by law as executors to the exclusion of those who are described by their title of officer, or in any other way by which they would be known, as well as those not named as executors, but who were such by implication, or according to the tenor. To come within the statute, literally interpreted, the person must not only be "named," but he must be named "as executor." But this is inconsistent with *Bayeaux v. Bayeaux, supra*. If any latitude is allowed in the interpretation of this statute, it should be read as authorizing the granting of letters testamentary to every person whose appointment or nomination as executor is testamentary in its character, as that term has been heretofore used and applied, and as it is used at common law. This would include all deriving their power under the will, whether mediately or immediately. There is no reason for excluding those appointed under authority derived from the will, and admitting those not in terms appointed as executors, but whose nomination may be implied as within the intent of the testator as gathered from the will. Within a liberal and reasonable interpretation, and to give effect to the intention of the testator, the statute may be regarded as including within the convenient and generic term, "named as executor," every one who can trace his authority to the will as its source. It is not to be inferred that the legislature intended by the phraseology of this section to effect a radical change in the law as to the persons entitled to letters testamentary as executors. No such design is indicated in the statute itself, or in report of the revisers by whom it was reported. On the contrary, the section was reported to the legislature as but embodying in terms what was implied by the law then in force, which merely authorized the surrogate after the probate of a will "to grant letters testamentary thereon" (1 R. L., 445, § 3).

We should expect to find more explicit language, and some reference to it in the report of the revisers if so great a change in the law affecting wills and the power of testators, as is claimed to have been effected, had been contemplated by the framers of the law, or the legislature. Whether there would be any practical difficulty in substantially complying with the rules of practice and procedure prescribed by the statutes for the proof of wills and granting letters testamentary thereon, if there should be no executor named in the will, or he who was appointed by the will should decline to serve, and the only person who could claim the office under the will should be one appointed pursuant to a power given by the will, it is not necessary to consider. My impression is that effect could be given to every material requirement of the statute in such case, but that question is not before us.

By the will of Mr. Alexander an executrix was appointed, qualified to act, and who could have been summoned to appear and qualify as prescribed by statute. Had she failed to comply with the statute, she would have been deemed to have renounced the appointment, and letters of administration, with the will annexed, would have been granted to some suitable person. The executrix named could take no measures for the designating and commissioning of a co-executor until she had qualified as executrix (Jackson and Gill v. Paulet, 2 *Robertson's Eccl. Rep.*, 344). Mrs. Alexander was named in the will as executrix, and did take upon herself the office and qualifications as required by law. The statute was literally complied with by the issue of letters testamentary to her. Speculations as to the difficulties that might arise in other cases need not be indulged in. As executrix, and after the granting of letters testamentary to her, she was empowered by the will to select a male friend to serve with her as co-executor. Unless the statutes

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referred to above, directing to whom letters testamentary shall be granted, forbid the granting of letters to a co-executor upon the nomination of the executor named in the will, they may be granted consistently with every other part of the statute. All that can be said of the other provisions is, that they do not in terms provide for such an appointment.

Every legal power and every legal trust conferred or created by will, that is such as are not prohibited by, or are inconsistent with the law, may be executed by the executor. An executor may execute the will, and carry out the testamentary intentions of the testator, in such way, by such agencies, with such assistance, or such a division of labor and responsibility, as the testator may authorize. The will being legal in every part, every part may have full effect, including the power to executrix to select a co-executor. To deprive her of this power might disappoint or substantially defeat the wishes of the testator. He may have foreseen that an intelligent and efficient aid and coadjutor would be necessary to the due execution of his will and the preservation of his estate, and he preferred to leave the selection to her, to naming one, in his will, who might not be living at his death, or whom it might not be desirable to select at that time, by reason of some change in the relation or situation of the parties. To deprive her of this power may compel her to surrender the trust, and give to others the sole management and custody of an estate wholly hers, after the payment of debts. That this is not unreasonable or contrary to the policy of the law is evident from the provision made in respect to the administration of estates of intestates. Had Mr. Alexander died intestate, the widow would have been entitled to letters of administration, and she could have joined the appellant or any other person with her in the administration (2 R. S. 74, §§ 1, 34). When

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the testator has made her executrix, and given her the like power, the rule should be the same. The reasons assigned by the surrogate for denying the application to vacate the letters to the appellant, fully sustain his conclusions.

If there are objections to the competency of the appellant, those interested in the estate may apply for his removal as executor, for that reason. This application was based wholly upon the alleged invalidity of the delegated power to the executrix to name a co-executor, and the want of power in the surrogate to grant letters testamentary to her nominee.

The judgment of the supreme court should be reversed, and the order of the surrogate affirmed.

CHURCH, Ch. J., RAPALLO, and ANDREWS, JJ., concurred.

GROVER and FOLGER, JJ., dissented.

MILLER, J., did not sit.

Sherman v. Conner.

SHERMAN *against* CONNER.

*New York Superior Court; Special Term, November,
1875.*

SHERIFF.—SERVICE OF PAPERS.

The provision of 2 R. S., 285, §§ 55, 56, that papers required to be served on a sheriff, may be served by leaving the same at the office designated in his statutory notice of the place of his office,—does not include the summons in an action against the sheriff. Such a summons must be served as in the case of other defendants.

The statute is to be construed as referring to papers in respect to which it is the sheriff's duty to provide official care and attention, and which are served on him as sheriff by virtue of his office; not to those which concern him personally.

Austin Sherman brought this action against William C. Conner, sheriff of the city and county of New York, for an escape, and the summons was left at his office during defendant's absence, with his under-sheriff. The defendant now moved to set aside the judgment entered thereon.

O. P. Buel, for plaintiff.

Vanderpoel, Green & Cumming, for defendant.

VAN VORST, J.—The only method of commencing civil actions in the courts of record of this state is by the service of a summons (*Code*, § 127). The method of service is provided for in § 134. The

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present case comes under the 4th subdivision of this section, and service of the summons could only be made, so as to commence the action, by the delivery of a copy thereof to the defendant personally, unless the fact that the defendant was the sheriff of the city and county of New York, and was prosecuted for the escape from the liberties of the jail of a party held by him under execution, justified a service other than personal.

The service of the summons in this case was not made upon the defendant in person, but a copy thereof was delivered to John E. Cumming, the under-sheriff of the defendant, at the office of the sheriff, the defendant himself being absent therefrom. In default of an answer, on the 19th of last July a judgment was entered against the defendant for the sum of seven hundred and fifty-five dollars and thirty-two cents.

The defendant makes oath that no summons in the action was ever served upon him, and that the first intimation he had of the action and the judgment was from his attorneys on August 5, after the judgment was entered. The service on the under-sheriff, instead of the defendant in person, is claimed by the plaintiff to be justified under the provisions of the Revised Statutes (2 *Rev. Stat.*, p. 285, §§ 55, 56; see 2 *Edm. Stat. at L.*, 296). Section 55 provides, that it shall be the duty of the sheriff of every county to keep an office in some proper place in the city or village in which the county courts are held, of which he shall file a notice in the office of the county clerk. Section 56 provides that every notice or other paper which shall be required to be served on any sheriff may be served by leaving the same at the office designated by him in such notice, during the hours for which the office is required to be kept open. But if there be any person belonging to such office therein, such notice or paper shall be delivered to such person, and every such service shall be

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deemed equivalent to a personal service on such sheriff.

It appears in the case that the sheriff, on January 12, 1874, filed in the office of the county clerk a notice specifying that the office of the sheriff of the county of New York is located in the basement of the new courthouse, in the City Hall park, and that the service was made at the sheriff's office.

The provisions of the Revised Statutes above are taken from article second of chapter three, and are embraced under the head "of the powers and duties of certain judicial officers."

I am of the opinion that a summons in an action against the sheriff is not a "notice or other paper," which may be served upon him by leaving the same at his office, or otherwise than by delivering the same to him personally.

The provisions of the Code referred to relate to the manner of bringing actions, and should not be held to include a suit against the sheriff for any act or omission in office, by which he has incurred a personal liability. The papers and notices which may be served upon the sheriff, by leaving the same at his office, with his clerk or deputy, refer to the large class of papers and notices which are required by law to be served on the sheriff as such, by virtue of his office, and which do not concern him personally, as an action for an escape certainly does.

There are statutory notices respecting elections, precepts for the summoning of jurors, notices and orders to return execution, notices concerning redemption of real estate, papers on the surrender of bail, notices in respect to the non-acceptance of bail, and other official notices and papers, in respect to which it is the duty of the sheriff to provide official care and attention, and which might well be left at his office with the same effect as if left with himself.

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Even if the provisions of the Revised Statutes above referred to could be construed to embrace the service of notices or papers by which an action might be commenced against the sheriff, then, as to such method of service, the same are repealed by § 468 of the Code, and by the other sections above referred to, the latter of which establish the manner in which actions may be commenced.

The judgment should be set aside, with costs.

NOYES *against* PHILLIPS.*Court of Appeals, 1875.*

LIQUIDATED DAMAGES AND PENALTY.—RESCISSION OF CONTRACT.—EXCEPTION.

In an action on a contract which contained a clause of forfeiture of five hundred dollars in case of breach, plaintiff recovered that amount on theory that it was liquidated damages, and defendant had the verdict set aside on the ground that the clause was only a penalty. On the second trial defendant insisted that the clause was only a penalty, and plaintiff took an exception involving this question, but the verdict was for one thousand dollars damages.—*Held*, that defendant could not have the judgment reversed.

A recovery upon a penal clause in a contract *inter partes* is not limited by the amount of the penalty.

An exception taken by one party to the rule of law, applied on the trial, can not avail the other party if the result of its application proves unfavorable to him.

The insertion of a penal clause in a contract does not restrict the party aggrieved by a breach to the relief afforded by the penalty.

The action was brought in the city court of Brooklyn by Daniel L. Noyes and William D. Wines against George Phillips, to recover damages for the breach of an agreement not under seal, to exchange a house and lot owned by the defendant for certain vacant lots owned by the plaintiff, the material parts of which agreement involved in this appeal are as follows:

“Agreement made and concluded on March 14, 1873, between George Phillips . . . of the first part, and Daniel L. Noyes and William D. Wines of the second part, as follows :

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“The party of the first part agrees to exchange his lot and three-story brown-stone house . . . subject to a mortgage of five thousand two hundred and fifty dollars, but free from all other incumbrances, and receive therefor the property belonging to parties of second part, being bounded as follows . . . the same to be free and clear from all incumbrances.

“And the parties to these presents each agree to give a good and sufficient deed for their respective pieces of property, on or about April 1, 1873, or forfeit the sum of five hundred dollars.

“JOHN PHILLIPS,

“DANIEL L. NOYES.

“WILLIAM D. WINES.”

The plaintiffs proved that John Phillips was authorized to execute this agreement for the defendant, and that said agreement, subsequent to its execution, was ratified by the defendant. The defendant made no question upon the trial but that he was so authorized.

Plaintiffs also proved an offer to perform on their part, on April 1st, and a refusal by the defendant to either give a deed of his house or pay the forfeit, and that the equity in defendant's house and lot was worth one thousand dollars more than their lots.

The question as to the difference in value was submitted to the jury under a direction by the court that this difference would be the measure of plaintiff's damages. The defendant requested the court “to instruct the jury that they can not, under any circumstances, go beyond five hundred dollars or five hundred dollars and interest, from April 1, 1873,” which was declined, and the defendant excepted.

The plaintiffs requested the court to charge the jury as matter of law, that “the amount specified in the agreement is liquidated damages, and not a penalty, and the plaintiffs, if entitled to recover at all, are en-

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titled to recover the sum of five hundred dollars," which was declined, and plaintiffs excepted.

The jury found a verdict for the plaintiffs, for one thousand dollars: upon which judgment was entered and affirmed, upon appeal to the general term. The plaintiffs appealed to this court.

Lewis & MacKay, for defendant appellant.

Erastus New and *N. C. Moak*, for plaintiffs respondent.—The sum of five hundred dollars, named in the agreement, was a penalty and not liquidated damages (*Richards v. Edick*, 17 *Barb.*, 260, 265–269; *Salters v. Ralph*, 15 *Abb. Prac.*, 273, 275–6; *Colwell v. Lawrence*, 38 *N. Y.*, 74, affirming 38 *Barb.*, 643, 647–9; *Bage v. Milard*, 12 *N. Y. Leg. Obs.*, 57). “Not a single word is said about liquidated damages and the word ‘forfeiture’ which is equivalent to a penalty, is used, which manifests that a penalty was intended” (*Colwell v. Lawrence*, 38 *N. Y.*, 74). The use of the word “forfeit” implies a penalty, and the sum specified in the agreement was not intended to be paid as damages for a failure to perform simply, but rather as a penalty for a failure to perform “on or about April 1st” (*Staples v. Parker*, 41 *Barb.*, 648, 651–3). The only question raised by the defendant’s request and exception is whether treating the five hundred dollars as a penalty the jury in estimating the damages could legally find a verdict against the defendant for a greater sum. The damages in consequence of a breach were fixed by a well settled legal rule—the difference between the agreed price and the market value at the time for performance (*Engel v. Fitch*, *L. R.*, 3 *Queen’s Bench*, 314; *Pumpelly v. Phelps*, 40 *N. Y.*, 59, affirming 43 *Barb.*, 469; *Lock v. Furze*, *L. R.*, 1 *C. P.*, 441; *Exchequer Chamber*, *S. C.*, 6 *Am. Law Reg. N. S.*, 445; *Radford v. Wilson*, 2 *Bosw.*, 237; *Bush v. Cole*, 28 *N.*

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Y., 270). The five hundred dollars being named as a penalty or forfeiture, the instrument not being a bond under seal but a mutual agreement binding both parties to performance thereof, the plaintiffs were entitled to recover the actual damages, though they exceeded the five hundred dollars (Thompson v. Rose, 8 Cowen, 266; Harrison v. Wright, 13 East, 343, 347-8; Winter v. Trimmer, 1 W. Bl. Rep., 395; Graham v. Bickham, 4 Dallas, 149; Fisher v. Barrett, 4 Cushing, 381; Addison on Contr., 1089). This is not an alternative agreement. There is a complete and absolute agreement to exchange property, preceding and distinct from the alternative clause, which latter clause only relates to the time of performance, and provides a penalty for a failure to perform on a certain day. The plaintiffs under this agreement would have been entitled to a decree for a specific performance, and they are therefore entitled to recover damages for a breach.

CHURCH, Ch. J.—The parties agreed to exchange real estate upon certain specified terms, and each agreed to deliver a deed of his property at a time specified, “or forfeit the sum of five hundred dollars.” Upon the first trial the court held this to be a provision for liquidated damages, and the plaintiff had a verdict for five hundred dollars, which was set aside upon the application of the defendant upon the ground that the decision was erroneous, and that the sum should be deemed a penalty.

The case was re-tried upon this theory, and resulted in a verdict for the plaintiff of one thousand dollars, against his request and exception that it should be regarded as liquidated damages, and the defendant now seeks to reverse the judgment alleging error: 1st. In the decision that it is a penalty; and, 2d. That the recovery could exceed five hundred dollars. As to the first question, the parties have changed sides, and it

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is to be regretted that the first verdict was not allowed to stand, as being probably quite as just, if not as legally accurate; but we must consider the exceptions as presented. We do not think that the exception of the defendant raises the question whether the sum named is a penalty, or liquidated damages. It is quite evident that he did not claim on the trial that it was liquidated damages, and the only construction which can be given to his request to charge is, that assuming it to be a penalty, the jury should be instructed in awarding damages not to exceed the sum of five hundred dollars, which was refused, and an exception taken. It is unnecessary, therefore, to determine the question of liquidated damages. It is, however, proper to say that if that question was before us we should hesitate in holding it a penalty, and there are many reasons for regarding it as a provision fixing the measure of damages by the parties. The word "forfeit" is not conclusive. A fundamental rule upon this subject is that the words employed must in general yield to the intention of the parties as evinced by the nature of the agreement, the amount of the sum named, and all the surrounding circumstances. The sum named is reasonable in amount for a failure to perform this agreement; it is payable for one breach, viz., a failure to deliver a deed, and the injury is in some degree uncertain in amount and extent, and might depend upon many unforeseen contingencies. These are material circumstances favorable to an inference that the parties intended to fix this sum as the measure of damages. The question has been frequently before the courts, and authorities may be found apparently favoring either construction. As it is unnecessary to decide the question, it is only proper to disclaim an intention to decide that the sum named in this contract ought in law to be regarded as a penalty. Courts have felt embarrassed when called upon

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to enforce inequitable, harsh, or oppressive provisions in contracts, inserted often without reflection, or a full knowledge of their legal effect, by a laudable desire to harmonize the abstract principles of right and justice with the established legal rules that parties are at liberty to make contracts for themselves, and that it is the duty of courts to enforce them as made. By a liberal use of the element of supposed intention, they have been enabled to do so to a reasonable extent, and yet a reference to a few of the numerous authorities will illustrate the difficulties experienced in this respect (9 *N. Y.*, 551; 21 *Id.*, 253; 1 *Id.*, 450; 5 *Cow.*, 144, note b; 3 *J. C.*, 297; 22 *Wend.*, 201; 2 *T. R.*, 32; 11 *Ind.*, 70; 8 *Mass.*, 223; 5 *Allen*, 304; 13 *Wend.*, 588; 12 *Barb.*, 366; 17 *Id.*, 260; 15 *Abb. Pr.*, 273; 38 *N. Y.*, 74; 6 *East*, 529; 3 *Pars. on Cont.*, 156). For the purposes of this case we must regard the provision as a penalty. The exception of the plaintiff is of course not available to the defendant, and his exception does not embrace the point. The case was tried upon his view of the law on that subject, and he can not complain.

The second point is not tenable, it being a penalty and contained in an agreement *inter partes*, the plaintiff has his election to sue for the penalty, or for a breach of the contract. In the latter event he is not limited in the amount of damages to the penalty. The rule would be different in an action on a collateral bond with a penalty conditioned for the performance of the contract. In that case the penalty would be taken as the limit fixed by the parties. The authorities are quite uniform on this subject (*Addison on Cont.*, 7th ed., 367; *Mayne on Damages*, 2d ed., 169-70; 8 *Cow.*, 266; 13 *East*, 343; 4 *Dallas*, 149; 5 *N. Y.*, 422; 17 *Barb.*, 265). Parties are not released from performing their agreement by inserting a penalty for non-performance (3 *Atk.*, 371). It is claimed by the

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defendant that this principle does not apply to this contract, because the agreement to exchange is not absolute, but is in the alternative, and that an action for a specific performance would not lie. I do not think that such is the legal construction of the contract. It contains an express agreement by the defendant to exchange his property (describing it) with the plaintiff for certain specified property of the latter, and then provides that each party shall execute a deed by a specified time, or forfeit five hundred dollars, and is signed by both parties. In legal effect it is the absolute agreement of both to exchange property, and might be enforced by either party; and as we must regard the sum named as a penalty, it is to be construed as though it read, "we each bind ourselves to the performance of this contract in the penal sum of five hundred dollars." It can not be regarded as an agreement to do one act, or in lieu thereof pay a sum of money, thus leaving it optional with the party to do either; but if optional with the defendant, his failure to perform either would give the plaintiff the option to enforce either, or maintain an action for damages. The defendant occupies the position of refusing to perform the contract to exchange, or pay the forfeit, and claimed, and was allowed on the trial to reduce the damages below that sum; and yet he insists that while he might reduce the sum to any extent, the plaintiff could not increase it by the same character of evidence. In other words, while he is to have the benefit of the sum named to limit a recovery, he is not under the corresponding burden of being bound by it.

The answer to all this is, that the sum named is not a fixed measure of damages, and that the action is on the agreement to exchange property, and the sum named upon the theory upon which the defendant voluntarily tried the case, has properly nothing to do with

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the question of damages. The authorities cited do not sustain the position of the defendant upon this point.

The judgment must be affirmed.

“All concur, except GROVER, J., absent, and RAP-ALLO, J., not voting.”

MATTER OF FLOOD.

Before Hon. OWEN T. COFFIN, Surrogate of Westchester County, February, 1875.

ACCOUNTING OF EXECUTOR.—RIGHT OF RETAINER.—
DISPUTED CLAIMS.

The surrogate has power to pass upon a disputed claim of the executor or administrator against the estate.

Philip Flood, the administrator of the estate of Ann Williams, deceased, filed an account of his proceedings in respect to the estate. In the account was embraced a claim of the administrator against the intestate for three hundred dollars for rent, alleged to have accrued between May, 1861, and May, 1866, and before the death of the intestate, and the parties are all duly cited to attend the proof of this claim before the surrogate. This item is objected to by the next of kin, who, among other defenses interposes the statute of limitations. It is also objected by the next of kin, that this court has no power to try a disputed claim.

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Ralph E. Prime, for admr.,—Cites, §§ 37 and 38, 3 *R. S.*, 175 (5th ed.); and *Williams v. Purdy*, 6 *Paige*, 166.

Wm. A. Woodworth, for next of kin,—Cites *Tucker v. Tucker*, 4 *Abb. Ct. App. Dec.*, 428.

BY THE SURROGATE.—Previous to the revision of the statutes, an executor or administrator could retain a debt due to him without first proving it, and there were no means known to the law for a final settlement of the accounts of executors and administrators, and a distribution of the assets, without resort to a bill in chancery, nor could a debt against the estate of a deceased person be recovered by any one other than the legal representative, except by an action in the courts of common law, where the proceeding was costly and cumbersome, and perplexed by a system of pleadings and entries, the names and forms of which are now forgotten except by the oldest practitioners of our own day. One great object of the revisors in this respect was to do away with the difficulties, delays and expenses of the old mode of procedure. They provided, in order to attain ends so desirable, that surrogates should have jurisdiction to settle the accounts of the legal representatives of deceased persons' estates; and for that purpose might cause to be cited before them, the creditors, legatees and next of kin to attend such settlement (3 *R. S.*, 180, § 66, 5th ed.); and by the next section it was enacted that the persons so cited might attend such settlement and contest the same. By § 78, p. 182, the surrogate was authorized to make a decree in reference thereto, in which he should settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share. The revisors did not fail to provide a mode of ascertaining and adjudicating claims presented

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to the executors or administrators which were disputed. Such claims it was declared, might, under certain conditions be referred, and if not so referred, they might be prosecuted like any ordinary claim in courts of law, under certain other conditions and restrictions.

It has been a question much discussed in the courts, and with various results, whether surrogates had or had not under the authority conferred upon them by the 78th section, the power by their decree to "settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share," to adjudicate concerning disputed claims. The learned surrogate, Bradford, constantly and ably contended that those officers had such jurisdiction, and his views were sustained by the supreme court in several of the judicial districts of the state, while in other districts different views of the law were entertained, and the question learnedly discussed in several cases; among others, in the cases of *Magee v. Vedder* (6 *Barb. S. C. R.*, 352), and *Wilson v. The Baptist Educational Society of N. Y.* (10 *Id.*, 308), until at length, the court of appeals, in *Tucker v. Tucker* (4 *Abb. Ct. App. Dec.*, 428), finally determined against such jurisdiction.

It is contended, therefore, that this being a disputed claim, this court has no jurisdiction to try and adjudicate it. If this be so, it would involve the absurdity of the administrator agreeing with himself on a person to whom an individual claim of his, against himself as administrator should be referred. This, it is quite apparent, could not be done (*Gardner v. Gardner*, 7 *Paige*, 112). He would thus, if no other course were open to him, be compelled to resort to the supreme court to establish it. But the revisors wisely guarded against such an emergency. By section 37, p. 175, 3 *R. S.* (same ed.), it was enacted that no part of the property of a deceased person should be re-

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tained by the executor or administrator, in satisfaction of his own debt or claim, "until it shall have been proved to and allowed by the surrogate" ; and by the act of 1837, the proof of such debt or claim was authorized to be made on the service and return of a citation for that purpose, or on the final accounting. Thus a direct authority is conferred on the surrogate to receive the proof of and adjudicate the claim of an administrator or executor ; while as to the debts and claims of third persons no such power is given.

It is true, the chancellor in *Williams v. Purdy* (6 *Paige*, 166) says, "the administrator is in the same situation as any other creditor in reference to proving his claim. He must therefore, like other creditors, not only verify the justice of his claim by his oath, but if it is objected to he must establish it by legal evidence in addition to his own oath." The administrator is, undoubtedly, "in the same situation as any other creditor" in reference to the necessity of proving his claim. If the learned chancellor meant to imply that he must prove it, when contested in the same forum, it must be borne in mind that he belonged to that school of distinguished jurists, as appears by the case of *Kidd v. Chapman* (2 *Barb. Ch. Rep.* 414), who held that surrogates had jurisdiction to adjudicate claims of third persons, and whose doctrine on that subject has been overborne by the case of *Tucker v. Tucker*.

This proceeding, so far as the administrator's claim is concerned, is in effect an action to recover it of the estate of the decedent ; and such a claim may be tried in this court (*Vulte v. Martin*, 44 *How. Pr. R.*, 18). The authority of the surrogate, in this respect, is also recognized in the recent cases of *Everts v. Everts* (62 *Barb. S. C. R.*, 577) ; matter of *Cunningham's estate* (8 *N. Y. S. C. R.* [1 *Hun.*], 214) ; and *Elmore v. Jaques* (9 *Id.* [2 *Hun.*], 130).

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I shall therefore proceed to the trial of the administrator's claim so contested.

HOWLAND *against* WOODRUFF.

Court of Appeals, February, 1875.

CASE AND EXCEPTIONS.—FACTOR'S ACT.—CAUSE OF ACTION.

The practice of printing the stenographer's minutes of the trial at length and without a revision as a case for use on appeal reproved. The possession of merchandise contemplated by section 3 of the factor's act (*L. 1830, p. 203, c. 179*), as essential to the power of factors to pledge the goods to their principal, is the actual and not a constructive possession.

Where the factor obtained an advance while the goods were still in the carrier's possession, *held*, that the persons making the advances did not obtain title as against the consignors.

The action was brought in the city court of Brooklyn by Slocum Howland, Leonard Searing, and W. F. Bancroft, against Franklin Woodruff and others, to recover possession of over four thousand bushels of barley, and damages for their detention, &c.

It appeared that the barley was consigned by plaintiffs to Griffin & Willetts, their factors. The bill of lading was not signed by the captain, but by Brown & Smith, shippers, and contained a clause that the captain was to hold the load five days without charging, and after five days, to hold at a per diem charge.

The captain on arrival in New York showed the bill of lading to the consignees, who made some en-

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tries of its contents in their books. While the barley was still on board, the consignees agreed with the defendants to store the barley with them, and the defendants, on the faith of the arrangement, made an advance of money, and the consignees thereupon directed the barley to be unloaded at the defendants' store-house, which was done. At the trial, the court dismissed the complaint, and afterwards denied a motion on the minutes for a new trial.

Plaintiffs appealed from the judgment.

In the court below at general term the following opinions were rendered :

MCCUE, J.—I think the instrument offered in evidence, though perhaps somewhat informal, contained all the essential requisites of a bill of lading.

It was signed not by the captain of the vessel, but by the shippers, and contained the name of the consignors (the plaintiffs), and the name of the consignees, "to Griffin & Willets, No. 10 South Street, New York."

Contracts for the freighting of goods on our canals are usually less full and formal than when the property is to be carried by sea, but they must have all the essential qualities, or else they can not have the full effect of a bill of lading (*Covill v. Hill*, 4 *Den.*, 330). A written instrument identical in form was so held to be a bill of lading in *Dows v. Rush* (28 *Barb.*, 158). Also authorities referred to at page 172 and 183.

There was a substantial delivery to the consignees of bill of lading.

The captain being asked :

"Immediately on your arrival in New York, did you see Griffin, Willets & Co.?" replied :

"Yes, sir ; I reported there the same morning.

"Had this bill of lading with you ?

"Yes, sir.

"You gave them or showed them this bill of lading, didn't you ?

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"Yes, sir.

"And they made memorandum from it?

"Yes, sir.

"Made entries in their books?

"Yes, sir."

The instrument was not executed in duplicate as is usual, and this may account for the fact that it was retained by the captain, or it may have been retained, and probably this is the true explanation because the bill of lading contained entries as to the shipment of other grain, for the account of other parties. There was, nevertheless, a substantial compliance with the law.

The captain of the boat reported his arrival, exhibited his bill of lading, and held himself and his cargo subject to the orders of the consignees, and in obedience to their direction, the next morning, by the assistance of a tug sent to him by the consignees, arrived with his boat at the warehouse of the defendants, and reported to the owner of the warehouse, meaning probably the person in charge.

This was between nine and ten o'clock in the morning of the day on which the defendants made the advance to the consignees.

The advance—four thousand dollars—was made about noon of that day, and about one o'clock in the afternoon the delivery of the cargo was commenced, and was completed that afternoon.

I think the evidence shows a delivery, in fact as well as in law, of the cargo to the consignees.

The two cases referred to by appellant's counsel, *Shindler v. Houston* (1 *N. Y.*, 261), and *Stephens v. Santee* (49 *N. Y.*, 35), are not in point as to question as to what constitutes a complete delivery.

In both cases something yet remained to be done before the acceptance by the vendee of the merchandise agreed to be purchased. In the case under ex-

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amination, the consignees had assumed the custody and control of the grain, and had arranged for its storage.

It is hardly possible to state any other or further possession of merchandise of this kind.

Even if it should be held that the consignees had not been "entrusted with the bill of lading," so that they had not the documentary evidence of title, "the facts in the case show that they were entrusted with the possession of the merchandise" to such an extent as to constitute them the true owners thereof, and to give validity to contracts made by them for advances.

The judgment and order appealed from should be affirmed, with costs.

REYNOLDS, J., dissenting.—It is evident that Griffin, Willets & Co., had no right as between themselves and the plaintiffs to pledge the grain in question for an advance for their own benefit.

The question is whether the defendants made the advance under such circumstances as to entitle them to protection. I understand that the defendants claim such protection under the provisions of the statute, commonly known as the New York Factors' Act.

First. On the ground that the factors, G. W. & Co., were intrusted with the possession of a bill of lading, or failing this: *Second.* That they were entrusted with the possession of the grain, and should, therefore, "be deemed to be the true owners thereof, so far as to give validity" to the arrangement by which the defendants advanced thereon. As to the first ground, even if the document set out at pages 8 and 9 of the case is to be regarded as a bill of lading, it was not intrusted to the possession of Griffin, Willets & Co.; it was merely exhibited to them so that they could make memorandum from it; but it was not inquired for by the defendants, and if inquiry had

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been made it could not have been shown for the simple reason that G., W. & Co. did not have it to show ; so it seems to me very clear that the defendants did not make their advance "upon the faith thereof."

The question then arises, did they make the advance upon the faith of possession intrusted G., W. & Co.

At the time the agreement was made for the advance, the barley was on board the vessel in the mass with three thousand bushels of barley, consigned to other parties. The five days, it is true, had expired during which the captain was to hold without charge, but he was still holding at a specified charge, till the consignees should remove the load. Under such circumstances, G., W. & Co. had no actual possession of the grain (see *Bonito v. Mosquera*, 2 *Bosworth*, 453). They did not and they could not exhibit any such possession.

The defendants trusted them entirely upon their word, and not from seeing in their hands either the grain, or any documentary evidence of title.

Griffin told the defendant Woodruff, that they had a load of barley, and afterwards that the boat was at defendant's warehouse, and upon that the check was given ; but the grain was still in the actual possession, and under the control of the captain, who could yet have refused to deliver ; and if his testimony is to be believed, he would have refused if he had then been informed of the true state of the case ; for he says his instructions were to "hold it until sold," and that Griffin told him that morning that the barley was sold.

I do not see, therefore, how the defendants have acquired any title as against the plaintiffs, the true owners of the grain.

I think, therefore, a new trial should be granted.

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R. H. Huntley and *Rufus L. Scott*, for appellants.

S. Boardman, for respondents.

ALLEN, J.—If by any protest on our part the profession could be induced to abandon the machine-made cases, which under the present system have taken the place of the methodical and carefully-prepared cases and bills of exception of former days, the court would plead earnestly for such a reform, as it would be a great relief to every court of review, and aid in the dispatch of business and an intelligent administration of justice. Stenographers have taken the place of the attorneys whose duty it is to prepare, and of counsel whose duty it is to peruse and examine, and of the judge who should settle cases and exceptions for the purposes of review. The rough, ill-digested, defective, and frequently unintelligible transcripts and translations of the stenographer's minutes of the trial, without correction or explanation, are stitched together and labelled a case or exceptions as may suit the fancy; and the labor is thrown upon the court to wade through a mass of stuff, and dig out the kernel of facts, or the point of an exception which may be buried up beneath it. Some parts of the case before us are entirely unintelligible, and the exceptions taken in the course of the trial are so interjected, that it is not easy to place or apply them. It is very likely that parties may sometimes suffer by this process, which, while it saves the labor of the profession, very greatly adds to that of the court, and not unfrequently embarrasses it in arriving at a certain and definite understanding of the merits.

A rule of the supreme court might correct this evil to a great extent. The practice of printing the evidence by question and answer in most cases only benefits the printer. There are but few cases in which

for any purpose this method of setting forth the evidence is necessary or proper. It ought in justice to the attorneys for the present appellants to be said, that the record before us compares favorably with the mass of those brought into this court, and is more perfect than many of them.

Without scanning very closely the precise relations between the plaintiffs and Griffith & Willets in respect to the grain in controversy, as evidenced by the documentary evidence, and disclosed by the testimony, it will be assumed that the latter firm, commission merchants in New York, were the factors of the plaintiffs, the owners, and that the same was consigned to them for sale for a commission. It is conceded that the consignors were the owners of the grain, and that the defendants were merely the factors of the owners, without, so far as the case discloses, any lien upon or interest in the property, except as they might earn a commission upon its sale. The consignors might have at any time changed the destination of the barley, or, revoking the agency of the consignees, assumed the actual possession and control of it (*Mitchel v. Ede*, 11 A. & E., 888). No property was at any time vested in Griffith & Willets. The consignors did not intend to, and did not by the delivery of the grain to the carrier at its place of shipment vest the property in the consignee. During its transit there was no apparent ownership in Griffith & Willets, which would have enabled them to pledge the barley to a third person, and there was no change in the possession or apparent ownership after the arrival of the barley in New York prior to the transaction with the defendants, which can affect the rights of the parties, or give effect to the factors' act so as to validate that transaction as against the plaintiffs. The title of the defendants must, therefore, rest entirely upon the provisions of the act of 1830, ch. 179, known as the "Factor's Act"

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(4 *N. Y. Stats. at Large*, 461), and unless upon a just interpretation of that statute they acquired a valid title, the plaintiffs as the rightful owners were entitled to repossess themselves of their property.

The first question is as to the precise extent to which the plaintiffs intrusted their factors with the possession of the property, or the documentary evidence of title. It is claimed that Griffiths & Willets pledged the barley to defendants as a security for the repayment of a loan of money upon the faith and credit of the pledge. At common law, a factor could not pledge the goods of his principal, and the statute referred to is designed for the protection of those who, in good faith and in ignorance of any defect of title in the pledgor, or of the claims of others to it, advance money or incur liability upon the faith of the merchandise and the ownership thereof by the pledgor, as evidenced by the possession of the property, or the documentary evidence of title with which he has been intrusted by the owner. It is the act of the owner in intrusting the factor with the possession of the goods or the documentary evidence of ownership; the apparent ownership and right of disposal, in connection with the fact that innocent third persons deal with him upon the faith of such apparent ownership, that estops the owner from following his property into the hands of *bona fide* vendees or pledgees, and gives the latter a better title than their vendor or pledgor had.

I am aware that there has been some criticism upon section 3 of the factor's act, and a doubt expressed as to what phrase or subject the last words of the section "upon the faith thereof," refers. But reading the section in view of the clearly-expressed intent of the legislature, and the general scope of the act, which was not to deprive owners of their property without any fault or act of theirs, or to protect any but *bona fide* purchasers for value, it is very evident that the money

must be parted with upon the faith of the property, and the apparent title of the party assuming the right to deal with it, manifested either by the possession of the property, or the usual documentary evidence of title. The act was intended for the security of those who deal with a factor or agent in the belief that he is the true owner; and that belief must be induced by the act of the owner in intrusting the factor or agent with the apparent ownership (*Stevens v. Wilson*, 6 *Hill*, 512; *S. C. in error*, 3 *Den.*, 472). A factor is an agent for the sale of merchandise, and ordinarily has the possession, management, and control of the property, the subject of the agency; but the actual possession is not essential to constitute an agency which would pass under that name, as it is ordinarily applied to distinguish it from agencies of other descriptions.

The plaintiffs had not intrusted Griffiths & Willets with any bill of lading, custom-house permit, or warehouse keeper's receipt for the delivery of the grain, and the latter firm had no documentary evidence of title.

The manual possession was in the master of the canal boat C. F. Jewett, "in which the barley was mingled with more than three thousand bushels of other like grain, belonging to, and consigned by and to other persons. The possession of the master of the boat, in the absence of evidence of title, or interest in others, was that of the true owner. The grain was in the boat under a special agreement, making a part of the shipping bill in the possession of the master, and which was the only document in evidence tending to show the relations and rights of the parties, that the master was to hold load for five days without charge, and after five days he was to hold it at one dollar and fifty cents and wharfage per day, until consignees removed load, to be paid *pro rata* by the

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owners of all the grain. The boat had taken the grain to New York on the last trip for the season, and the owners of the grain had therefore provided for storage in their own names until the grain should be sold.

The jury would have been authorized upon the evidence to find that this was well understood by the consignees, and that the grain was not to be removed until sold. The factors did not even assume any right to control or direct as to the storage of it, and only directed its removal from the boat upon a representation that it was sold. It was not intended to entrust the consignees with the possession. It was not necessary to their agency—there was no possession vested in them. They could not have obtained possession for the purpose of storing grain elsewhere, except by violating the orders to the master of the boat, which the jury might well have found were known to them, and consistent with the directions to them from the plaintiffs directly. Possession for certain purposes may be either actual or constructive, and the circumstances must determine which is sufficient in a particular case to change or affect the rights of parties or the title to property. But as the possession intended by the act is that which may enable a fraud to be perpetrated upon one acting on the faith of it as evidence of ownership, it is self-evident that actual possession is required as distinguished from constructive possession. The act is in harmony with, and many of its provisions, including those of the third section, are based upon the maxim, that he who by his own act has put it in the power of another by an apparent ownership of property to deceive others shall suffer, rather than those who innocently part with value upon the faith of such appearances. It is the open, visible appearances that give effect to the transaction, and estop the owner from claiming his goods. The plaintiffs, so far from entrusting their factors with the possession,

did not contemplate a possession of the property by them. They gave authority to sell, and perhaps an incidental power to control and direct the bailee having the possession. A constructive possession can not, without the aid of some documentary evidence showing that the manual possession of one is for the benefit of another, deceive any one. It is difficult to spell out a constructive possession of this barley in Griffiths & Willets, who had a mere agency to sell, without authority to change the place of deposit, or to provide storage, or to direct its removal, except upon a sale. A constructive possession can only be claimed in support of, and based upon, some interest in, lien upon, or title to property in the possession of one as bailee or agent for a special purpose. It is the ownership, absolute or qualified, that draws to it the possession. But here it is sought to claim it as against the rightful owners as to property in the hands of a bailee selected by the owners, and in behalf of those having and claiming no interest in, or lien upon it. This would be to build up a constructive possession inequitable and unjust, and which would deprive the owner of his property for the benefit of one who did not act upon the faith of any apparent possession or right of possession, but upon the mere word and promise of the person with whom he dealt. This was not the object of the statute, and it can not legitimately be so construed as to accomplish such a result. If Griffiths & Willets had, before a sale of the barley, taken possession of it, and removed it to another place of storage, and taken a receipt in their own name, and upon the faith of that receipt obtained an advance from the defendants, it could not be said then, that they had been entrusted with the possession by the plaintiffs; and this is required by the statute to enable the factor to pledge the property, or deal with it as his own.

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The factor's act was considered by the superior court of New York in *Bonito v. Mosquera* (2 *Bos.*, 401), and an elaborate and exhaustive opinion prepared by Chief Justice DUER, and concurred in by Justices BOSWORTH, SLOSSON, and WOODRUFF. The learned chief justice reviews most of the reported cases bearing upon the construction and effect of the act, and among the propositions deduced from an examination of the subject, and formally advanced by the court is this: that the possession of goods by a factor "not having the documentary evidence of title," that can alone enable him to create a pledge valid as against the owner, is an actual, as distinguished from a constructive possession. The principle was applied in that case. The decision is criticised in the same court by Chief Justice ROBERTSON in *Pegram v. Carson* (10 *Bos.*, 505), concurred in by Judge WHITE, and dissented from by Judge MONELL. But the latter case is not in conflict with the proposition referred to, or with the plaintiffs' title to recover in this action. There the factors to whom merchandise was consigned by the owner for sale, with bills of lading making it deliverable to them, received the merchandise and stored it according to the usage of business, with a store-keeper employed by themselves, taking receipts in their own name, thereby having not only the virtual control of the property, but the documentary evidence of such control, and the right of possession. That case was probably rightly decided, but the circumstances were essentially different from those which exist in the present. *Cartwright v. Wilmerding* (24 *N. Y.*, 521), was similar in its facts and circumstances to *Pegram v. Carson*, and neither is applicable to the case in hand.

The position that the possession of merchandise contemplated by the third section of the factor's act as essential to the power of factors to pledge the

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goods of their principal, is the actual and not a constructive possession, commends itself as reasonable, as in entire harmony with, and all that is needful to give effect to the design of the act and prevent fraud, and is the only interpretation of the act, which while it protects *bona fide* dealers with the factor, at the same time gives due protection to the innocent owner of merchandise.

Judge REYNOLDS, in his dissenting opinion in the court below, we think took the proper view of the case and the rights of the parties.

The defendants' claim to have advanced their money upon the faith of the grain, is at least doubtful, but we do not consider it.

The judgment must be reversed, and a new trial granted, costs to abide the event.

All concur, except RAPALLO and ANDREWS, JJ., dissenting.

Thompson v. Gould.

THOMPSON *against* GOULD.

*Supreme Court, First Department, First District;
Special Term, June, 1875.*

PLEADING.—DEMURRER.

In an action for damages for refusal to receive and pay for certain gold contracted for by defendants, an allegation of damages in the complaint, in the words "that by said refusal" plaintiffs' assignee "was damaged" so many dollars, without as matter of fact showing how that, or any damage arises, is insufficient to give defendants notice of the question to be tried, and a demurrer to such complaint for want of sufficient facts to constitute a cause of action is good.

Facts must be set forth in the complaint from which the court can infer that the plaintiff has sustained damage. A mere conclusion asserting damage is not enough.

A complaint in an action by an *assignee* of a claim for non-performance of a gold contract, alleging that "the defendants have at all times refused and neglected to *receive the gold*, or to *pay the plaintiff*" therefor, is insufficient; and a demurrer on the ground of want of facts sufficient to constitute a cause of action will be sustained.

Robert H. Thompson brought this action against Jay Gould and others, alleging in his complaint that one Harrison on September 24, 1869, at the city of New York, entered into a contract of sale with the defendants, by which Harrison was to sell and deliver on the next day, September 25, through the New York Gold Exchange Bank, twenty-one hundred thousand dollars (\$2,100,000), gold coin of the United States, to one Albert Speyers, and the defendants agreed that Speyers should receive this gold, and should, at the same time, pay through the same bank to Harrison the sum of thirty-three hundred and sixty thousand dollars (\$3,360,000) in currency.

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That at the same time and place Harrison was ready and willing to deliver twenty-one hundred thousand dollars (\$2,100,000) gold coin, "in manner as aforesaid, and duly tendered payment thereof at said time, and in said manner."

That Speyers and the defendants have at all times refused and neglected to receive the gold, or to pay to the plaintiff the currency aforesaid.

That by said refusal Harrison was damaged five hundred and sixty-seven thousand dollars (\$567,000).

That on October 19, 1874, Harrison assigned his claim to the plaintiff.

The defendants demurred to this complaint, for want of facts sufficient to constitute a cause of action.

Sullivan, Kobbe & Fowler, plaintiffs' attorneys;
Algernon S. Sullivan, of counsel.

Shearman & Sterling, defendants' attorneys; *John W. Sterling*, of counsel:—I. There is no averment of any tender or offer of performance *made to Speyers or to the defendants*. It was alleged that Harrison was ready to pay, and tendered payment, but it is not said to whom. The only words which it can be claimed amount to an intimation of the person to whom the tender was made, are that "Harrison tendered payment in said manner"; which are insufficient to identify the person to whom the tender was made. The person to whom the tender is made is no part of the *manner* of tender. "Manner" refers to something in the mode of tender itself, the form, the ceremony, the attendant circumstances of the act, and, in this case, refers only to the place, and other attendant circumstances. All, therefore, that is pleaded in this case is, that Harrison tendered payment on September 25, 1869, at the city of New York, which, though proper and necessary, does not obviate the

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necessity of an averment that he made the tender of offer of performance to the defendants, or their authorized agents (*Beecher v. Conradt*, 13 *N. Y.*, 108; *Dunham v. Pettee*, 8 *Id.*, 508; *Lester v. Jewett*, 11 *Id.*, 453).

II. The complaint is also defective in omitting any averment of a demand by Harrison for payment of the currency price. The demand, as well as the refusal, is necessary in order to constitute a cause of action. The plaintiff's assignor, certainly, was not injured by the failure of the defendants to take his gold coin. This he was bound to offer, but if the defendants chose to pay him the price, leaving the gold coin on his hands, he certainly could not complain.

III. There is no allegation of refusal to pay the price which is sufficient to excuse a demand as on the part of the plaintiff's assignor. All that is said on this point is the general allegation that the defendants "wholly refused and neglected, &c." to receive the coin or pay the price to the plaintiff. No time is stated at which this refusal was made, and therefore it does not come within the cases from which it might be argued that a refusal to perform, addressed to the plaintiff's assignor in advance of the time fixed for the performance, would excuse him from making any demand. It does not appear when this refusal was made, and this defect, not in a mere matter of form as in the ordinary instances of omission to designate a time, goes to the very merits of the action.

IV. It is not pretended that the defendants ever refused to pay Harrison, the plaintiff's assignor. The averment is that they refused to pay the currency price *to the plaintiff*. It is not alleged that this refusal occurred after the assignment to the plaintiff; on the contrary, there is no averment of any tender or demand by the plaintiff, and the allegations of the

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complaint clearly show that there was a tender by Harrison, and a refusal to pay to the plaintiff at a time when Harrison alone, and not the plaintiff, was the party in interest. It has been adjudged that a complaint which only alleges a refusal to pay without expressly averring that this refusal was addressed to the party entitled to payment is bad (*Traver v. Halsted*, 23 *Wend.*, 66), the court there showing that in the absence of a certain averment, the refusal being one addressed to a neighbor in no way connected with the interested party, and of which he never heard. In this case, however, it affirmatively appears that the refusal was made to a person having no right or authority to receive the price, and it was, therefore, perfectly justifiable.

V. The complaint is bad because it alleges no facts from which the court can infer as matter of law, that the plaintiff or his assignor has suffered damage; such as, for example, that the price of gold fell, or that the plaintiff could not now or at any time, have obtained as large or even a larger price than that for which he agreed to sell the gold coin to the defendants. (1) Such facts are essential to a good complaint, and they are not supplied by the formal statement "that by said refusal, said Harrison was damaged, &c." (*Gould v. Allen*, 1 *Wend.*, 182; *Rider v. Pond*, 28 *Barb.*, 447), which is a conclusion of law without a single averment of fact to sustain it, and comes under the new English system of pleading, which is more liberal than our own, where a similar averment has been held altogether bad (*Smith v. Hayes*, *Irish Rep.* 1 *C. L.*, 333, 335).

DONOHUE, J.—The complaint in this case is for damages for non-performance of a gold contract. The defendants demur. The most important ground of demurrer is that no sufficient allegation of damage is

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set out in the complaint to give the defendants notice of what they are to try. Assuming that the complaint is correct in all other particulars and allegations, it amounts to this: the plaintiff says you, the defendants, on a certain day bought certain gold of me, which I have been and am now ready to deliver, and you will not pay for it, and I am damaged to the amount of so much by that refusal, without as matter of fact showing how that or any damage arises. Its seems to me on the authority of *Gould v. Allen* (1 *Wend.*, 182), and *Rider v. Pond* (28 *Barb.*, 447), the averment is not enough. Had this action been for the purchase price of the gold, the mere statement of the contract, tender, and refusal would have sustained an action for that price; but the action is not for that price; it is for damage on the defendants' failure to keep their contract, and there does not appear, either by express averment of fact, or any inference the court can legally draw, that the plaintiff has sustained damage; mere conclusion asserting damage is not enough.

In regard to the averment supposed to set out the refusal of defendants on which the action is founded, I think the complaint equally defective; the mere refusal to take the gold could not damage the plaintiff or Harrison; it was only the refusal to pay for it which would work that result, and that refusal is alleged to be a refusal to pay the plaintiff; it does not appear that the assignor Harrison has not been paid. How Harrison could be damaged by a refusal to pay plaintiff, does not appear.

For these reasons it seems to me the demurrer is well taken, and there must be judgment for defendants, with the usual leave to plaintiff to amend on payment of costs.

Wright's Accounting.

WRIGHT'S ACCOUNTING.

Before Hon. Owen T. Coffin, Surrogate of Westchester County; August, 1875.

Again, September, 1875.

EXECUTORS AND ADMINISTRATORS.—ACCOUNTING.—
DEGREE OF PROOF.—SURROGATE'S POWER TO
OPEN DECREE.—AMENDMENT.—MISTAKE.

Where a very large claim is presented against the estate by an executor or administrator who has sole custody of the books of account and papers relating to the claim, he should be held to the clearest possible proof of the claim.

The surrogate, having made a final decree upon an accounting, has no power to grant a re-hearing, upon the ground that the accounting party, without the excuse of mistake or fraud, &c., omitted to charge payments made by him.

Whether the appellate court might, in its discretion, receive evidence of such omitted matters, on the hearing of an appeal, Query ? *

An administrator presented a large claim against the estate, sufficient to absorb it all, and while pressing the claim, advanced moneys to the next of kin; and, on his accounting, choosing rather to treat these payments as made from his own money, omitted them from his official account and reported that as administrator he had paid them nothing. *Held*, that after the surrogate had made a decree disallowing the administrator's claim, the administrator could not have the decree re-opened to enable him put in proof that he had made such payments as administrator. †

* Compare REDFIELD'S "Law and Practice of Surrogates' Courts," p. 463, where the view is taken that the appellate court can not receive further proof.

† The distinction between a "final" accounting and other accountings is thus stated in REDFIELD'S "Law and Practice of Surrogates' Courts," p. 358: "There are several modes in which an accounting may be brought about, and the effect of an accounting

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An executor or administrator, who for the purpose of securing payment of his own claim, has elected to consider his payments to next of kin as gifts from himself, and has accounted accordingly, is not entitled to leave to reopen the accounts, and prove the payments as administrator, upon the ground that he did not know it was necessary to include such payments in his account.

I. August, 1875.—Matter of the final accounting of George S. Wright, administrator, &c., of John S. Wright, deceased.

differs according to the mode or nature of the proceeding. If the executor or administrator of his own motion merely files an account of his proceedings, this is a distinct admission by him of the matters therein stated, and may serve to inform those who are interested of what he has done. If the executor or administrator fails to disclose his proceedings, the parties interested have a right to require him to do so, and the statute, which we shall presently explain in detail, provides means by which he may be so compelled. But the mere rendering of an account, whether voluntarily or upon compulsory process, is not in itself a settlement of the matters contained therein. The account rendered and filed may inform those interested, but it does not bind them, and is not necessarily conclusive even upon the representative who renders it. To make it final and conclusive there must be an adjudication upon it; and to secure this, the parties must either appear and be heard, or there must be due notice to them that an adjudication and settlement of the account will be had. An account which, upon appearance or due notice, is thus examined and settled by an adjudication of the surrogate, concludes the parties in interest to a certain extent, as a judgment of a court of record would, as hereafter explained; and such an accounting is called a "*final* accounting." The words "final accounting" as thus used, do not imply the rendering of the *last* account, which finally settles the estate, and discharges the representative. That might in a proper sense be called the final account, but a "final accounting," as those words are ordinarily used in the administration of estates, means an account either first, intermediate, or last, which has been made conclusive, and in that sense "final," by an adjudication or decree of the surrogate, on notice to or hearing of the parties. Hence, there may be several successive "final accountings" on the same estate (*Glover v. Holley*, 2 *Bradf.*, 291). The phrase is not, indeed, uniformly used in this sense; but should be so understood wherever it occurs in the statute, unless the context indicates a different intent.

Wright's Accounting.

John T. Wright died November 1, 1868, intestate. On the 17th of the same month letters of administration were granted to George S. Wright, his son, it being claimed that the decedent left no widow. He left surviving, by his wife whom he survived, ten children. He also died possessed of a large personal estate, which was inventoried and appraised at something over one hundred and sixty-two thousand dollars.

In 1873 this proceeding was instituted with a view to a final settlement and distribution of the personal estate. On the filing of the account herein, the administrator, among other things, presented a claim for one-half the net earnings of the steamship "Daniel Webster," of which he claimed to have been half owner with the deceased, amounting, including interest, to some two hundred thousand dollars. Some of the next of kin filed objections to the account and especially to this claim.

Other facts sufficiently appear in the opinion of the court.

Foster & Thomson, for administrator.

Alex. Thain, for Wm. P. Wright and Abbey J. Fleming, next of kin, contestants.

THE SURROGATE.—The principal subject of examination in this matter has been the large claim presented by the administrator for one-half the net earnings of the steamship "Daniel Webster." This claim, if allowed, will exhaust the personal estate of the deceased; and, if disallowed, there will be some twenty thousand dollars as the distributive shares of the next of kin.

The "Webster" was purchased by the deceased on January 11, 1862, and chiefly earned the money which is the main subject of this controversey, under the management of the deceased, between that date and

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October, 1866, when she was lost, while in the service of the United States, during the civil war. In order to establish the claim of the administrator, it became necessary that he should show, 1. That he was half owner of the ship, and as such entitled to half her net earnings. 2. What those earnings were; and, 3. That the deceased had received the whole of them. The counsel for the administrator, as well as their managing clerk, N. Dana Wells, Esq., have, with a view to establishing these facts, displayed great patience, perseverance and skill. They have established a very large sum as the earnings of the vessel, and they have also shown, quite conclusively, that the deceased received the whole of them. The serious difficulty they have encountered has been in regard to establishing the interest of the administrator in the "Webster." Of course, unless they have proven his title to half of her, the claim must fail. This they claim to have done by means of the letters which passed between the deceased and the claimant on the subject, and the account books of the deceased. The facts chiefly relied upon are these:

In a letter written by the claimant at San Francisco dated November 29, 1861, to the deceased in New York, he says, toward the close of it, "Buy the 'Webster' for my account, and send her out."

Apparently, in reply, the deceased in a letter of January 28, 1862, says, sixty thousand dollars is the price Commodore Vanderbilt asks for the "Webster," and considers it a large price to pay for her, and continues, "but if I had nothing else to do, she would be a cheap ship at thirty thousand dollars. Now if she is chartered for thirty days," at one thousand dollars per day, "I would then have the ship for about thirty-six thousand." Subsequently, in the same letter, he says, "I have just closed the purchase of the 'Daniel Webster' at forty thousand. I expect to charter her

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at nine hundred per day. I take possession on 11th inst. You shall have one-half of her if you say you want it. Send me all the spare funds you can spare of your own or mine. She is an old ship, but two years younger and the same size as the Pacific." . . .

"If I find I can not charter her I will send her around to you. If Jim Huntington wants one quarter, and take charge of her, send him on."

The deceased wrote again to his son, a letter, dated "Wright's Island" (L. I. Sound) January 10, 1862, in which he says, "I wrote you yesterday by overland mail; I also telegraphed you that I had bought the 'Dan Webster.' I am in hopes to get a charter for her. If you want one-half of her you can consider it yours. I wish you had her out with you." . . .

The next day, in the same letter, he says, "January 11. To-day I take charge of 'D. Webster,' got steam on, going round to East River to lay, send me on all the money you can spare." . . .

He again writes, February 17, apparently in reply to a letter from the claimant to him, under date of January 20, in which deceased said he would not sell "an interest in the 'Dan. Webster' to John T. W., Jr." . . . "Mr. J. Brown I should not object to, but we do not want any more owners in her; we can afford to own her for ourselves. Had they the money to put down I would think about it." It would, therefore, seem, that George had proposed the conveyance of an interest to John T. Wright, Jr., and J. Brown, or one of them.

The letter next in evidence is one from George S. to his father, dated "San Francisco, February 10, 1862," in which he acknowledges having just received his father's letter of January 10, 11, and says: "The 'Webster' would do well there" (China), "in fact any steamer that can yet there will make money. I hope through Mr. Eldredge's assistance that we will

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get rid of the 'Herman,' as she is too large a ship for us. I note what you say about if I wish to take half of the 'Webster' I can do so. I except (accept) your offer and will consider half of her mine from the day you bought her, and if I only have a little luck, will be able to send you some funds on account of it; however, if we sell the 'Wright' I will have it. Please let me know what she cost you."

Again, in a letter of February 21, 1862, he says: "I note what you say about me taking an interest in the 'Webster,' and I now say I take one-half of her from the day you bought her. I note what you say in regard to shipment of money. When I have any I will send as directed by you." . . .

There is no further evidence of correspondence until October, 1866, a period of more than four years, when George writes, among other things, to his father, "By a telegram from Messrs. Moody & Telfair, I learned of the fate of our good steamer the 'Webster.' I am sorry she has gone, for she has been a good and faithful servant to us. I see she was insured but for thirty-five thousand dollars, which I was sorry to hear as you generally had more than that amount on; however, that is better none."

The next is a letter from the same, dated at "Victoria, V. I. November 10, 1866," with copies of telegrams to Moody & Telfair, in relation to collecting the insurance money.

Next, is a letter from George to his father, dated at San Francisco, March 29, 1867, in which he says: ". . . Father, I wish you would let me know whether you have made a will or not, and if you have not I hope you will at once; let me know." . . . "Did you get paid for coal on 'D. Webster' from government, and the other claims? Did Monroe get anything for us?" . . .

The last letter is from the same to the same, dated

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"At sea," April 29, in which the writer again speaks of his father making a will, urging him to do so, and saying that he "anticipates trouble" in case he should not. He also speaks of having found a "precedent for the claim of the 'D. Webster' against the government," and after reciting it hopes that Monroe "will be able to use it as a precedent for ours."

The claimant places great reliance upon an entry in an account book of deceased, containing an account of the disbursements for, and receipts from, the "Webster," under date of January 7, 1863, in the handwriting of deceased, in which he states the net earnings, and deducting cost of ship at one hundred and two thousand and seventeen dollars and fifty-six cents.

"J. T. Wright, $\frac{1}{2}$, \$51,008.78

G. S. Wright, $\frac{1}{2}$, 51,008.78

\$102,017.56."

On a subsequent page of the same book is an estimate in decedent's handwriting of the value of his property, made in 1863. Among the entries are these:

" $\frac{1}{2}$ of the 'Herman,' . . . \$40,000

'Daniel Webster,' $\frac{1}{2}$ of her, \$35,000, 60,000."

These facts, to which should be added the testimony of the claimant, are mainly relied upon to establish this claim of about two hundred thousand dollars against the estate.

There is no evidence that George S. Wright ever forwarded to his father any money towards paying his share of the purchase money. He was half owner of the "Herman," was most of the time at San Francisco and elsewhere on the Pacific coast, engaged in shipping business, and never had anything personally to do with the "Webster," other than to expend some money on her account, which will be alluded to hereafter. His father seemed to have the sole and entire control and custody of her, and received, as it became

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necessary for the claimant to show her entire earnings, and the thirty-five thousand dollars of insurance money.

It may be noted as somewhat remarkable that we have in evidence no correspondence between the father and son, relating to the "Webster," or, indeed, to anything else, between February 20, 1862, and October, 1866,—more than four years.

The title to the "Webster," after her purchase, continued, at the Custom House in New York, to stand in the name of Cornelius Vanderbilt, until the early part of 1864, when it was transferred to George S. Wright, and continued to stand, and was insured in his name down to the time of its loss at sea. The charter parties from 1862 to 1864 were made in the name of John T. Wright, as owner, and afterwards in the name of the son. During the first period, the government officials gave their checks for the services of the vessel payable to the order of the deceased, and during the second period, payable to the order of George S. Wright, who endorsed them and handed them over to his father, and all were deposited with his bankers, J. & J. Stewart & Co., and he applied them to his own use.

The facts mainly relied upon by the next of kin to defeat this large claim, I understand to be, substantially, these:

1. Already shadowed forth, that the deceased had the exclusive charge, control, and management of the "Webster"; that he purchased and paid for the vessel; made the charter parties; received all its earnings and paid all its expenses.

2. He had frequent settlements with the claimant, of accounts current rendered by him between January, 1862, when the ship was purchased, and 1864, on none of which occasions was there any consideration given to this vessel or its earnings, except that the claimant presented against the deceased, accounts of moneys

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paid out by him for the ship, which were allowed and paid by the deceased. Other accounts current were subsequently rendered, which are not in evidence, and whose contents are not known.

3. So far as appears, no claim was ever presented, or demand made, by George S. Wright, for any portion of the earnings of the ship, at any time, although the deceased survived its loss upwards of two years.

4. In the book kept by deceased, known as his "memorandum-book," and "ledger," marked A, at page 4, under date of October 1, 1863, he embraces, among items of property he is then worth, "Webster steamer, \$60,000." Again, on page 16, under date of January 1, 1866, he has an entry of "Steamer Dan W." (the "Dan" partly erased), "\$40,000."

It is worthy of remark that, while he clearly was the owner of one-half the "Herman," and two-fifths of the "Vixen" only, in making these estimates of what he was worth, he invariably estimates those respective parts, while in no instance does it appear that he estimated one-half of the "Daniel Webster," or any part short of the whole, other than as he seems partially to have done so in a sort of provisional way when he inserted the words and figures, " $\frac{1}{2}$ of her \$35,000," in the manner above referred to.

5. The oral admissions, proven to have been made by the claimant, since the death of his father.

Mr. Williams, who had a power of attorney from Wm. P. Wright, one of the next of kin, authorizing him to collect his share of the estate, testifies that he had various conversations with the administrator, commencing in 1871; that in the fall of 1873 he stated to the witness that, at that time, there was about one hundred and eighty-five thousand dollars of money on hand to be divided among the "heirs" (next of kin), exclusive of real estate, and promised to pay him William P.'s share in January following. He said his

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share would be eighteen thousand dollars or twenty thousand dollars.

Charles C. Jones, also having a like power of attorney from William P. Wright, testifies that George admitted to him in December, 1873, that William P.'s share would be eighteen thousand dollars or twenty thousand dollars, and that, at the same time, he paid him a draft of six hundred dollars, which Wm. P. had drawn on him.

Charles C. Fleming testifies that in 1869, with a power of attorney from Wm. P. Wright, and also from Mrs. Fleming, he called upon George, and that George stated to him the estate would amount to from four hundred thousand dollars to five hundred thousand dollars, and would divide about forty thousand dollars apiece: He also testified to various conversations on the subject, one of which is referred to in the letter hereafter quoted from, written by the administrator to John Fleming, his brother-in-law, under date of March 6, 1870, and he then said, among other things, when the witness asked for an advance to William P. of seven thousand dollars, he expected to close the estate soon, and "William will get his money; let him wait."

6. Written admissions by the administrator. On November 18, 1868, he wrote his brother-in-law, John Fleming, "Father left no will, and I have applied and been administrator. His property will be divided to his children, share and share alike. How long it will take I don't know. He has four steamers here, none of them doing anything."

(These four steamers were the "Cumberland," "New England," "Francis Wright," and "Mexico," probably.)

In a letter addressed to one of his brothers, dated Throgg's Neck, 1869, he says: . . . "I have advanced Mrs. Campbell, besides the \$12,000 I first gave her, \$5,000 more, four thousand of it I have taken

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a mortgage for, the other one thousand, her notes. She has run me almost crazy, but I have made up my mind I will not give her another cent. Her house is furnished and she is getting along, I believe, though I have not seen her in two weeks, but she is bound to be in a tight place soon, I think. Messrs. Foster & Thomson have advised me to put in a claim for the "D. Webster," which will amount to a good sum. I will do so, but if it is allowed, or whatever portion of it is, I will divide it as the estate is divided. It is *only* put in to keep Eliza from coming in in case of trouble." In another letter, addressed to his brother-in-law, John Fleming, dated at Throggs's Neck, March 2, 1869, he says: "Eliza has given me a considerable trouble lately. I have been obliged to loan her on her house on the mortgage, \$4,000, which she needed to fit her house up. I think now she will be able to get along. I want to try to keep her quiet until I get the estate divided, and then she can go to hell or anywhere else. I think from present appearances that the estate will close up at \$20,000 apiece, may be more. It depends upon what the steamers can be sold for." In still another letter to the same, dated at New York, March 6, 1870, he says: . . . "I seen your brother a few days ago. He came in to see me. Said William had written him to try and get money from the estate, six thousand, as he had made some purchases and the time of payment was at hand. I told your brother that I could not advance him that amount, but that I had written if he wanted one thousand for his immediate use he could draw on me for it."

From same letter:

"Have Abbey sign receipt for the amount and send me on. On the other side of this sheet I send you the form of the receipt."

From "other side of sheet":

"Received from George S. Wright, administrator

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of John T. Wright, deceased, the sum of \$5,500 on account of my distributive share of said estate."

In writing to one of his brothers, under date of October 22, 1872, he says: "In regards the estate, John did not sign, so I have concluded to go on and settle, and the lawyers have sent out notices to all parties to be at the final accounting of the personal property in about 60 days, as they all have to have 40 days' notice. I have put in 'Webster account,' which, if it is allowed, I will divide equally with all hands so if none of the heirs raises any objections to the account, it can be settled, and there will not be anything left for Eliza to fight for."

It is proper to remark that "Eliza," and "Mrs. Campbell," are the same person; that the decedent was a widower with ten children, and that "Eliza" was his housekeeper, by whom he had seven other children, and who, after his death, claimed to be his widow. Had she been such, she would, of course, have been entitled to one-third of the personal estate, and her children to distributive shares. When these letters were written, as I understand, that claim of hers was still in abeyance.

7. The practice decedent had of putting the apparent title to the whole, or a portion of his vessels, in persons other than himself.

The administrator testifies that his father owned two-fifths of the "Vixen," but had the whole registered in the name of "George S. Wright," as owner, while he was in entire ignorance of it until after the death of his father. The other three-fifths were said to be owned by other persons.

He also states that his father was sole owner of the propellor "George S. Wright," and that his father had her registered in the name of "George S. Wright," as owner. The registered ownership of the "Herman" and "Gussie Telfair," did not represent the true owners.

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I have endeavored thus to array the main facts, on either side, against each other, and, after due consideration, I can not resist the conviction that the claimant has failed to establish this large claim. It is purely a question of fact, and the impression made by the evidence is the only guide to follow in such cases. The oral and written admissions of the claimant seem to me utterly inconsistent with his claim, and to completely overthrow the *prima facie* case which he has established, to say nothing of other strong points against the claim. It will be observed, by reference to the proofs, that the decedent was in the habit of making estimates of what he was "worth." In every instance, he invariably estimates the one-half of the "Herman," and two-fifths of the "Vixen," and the whole of the "Webster," to which I have already alluded. It is true that, at the end of the first year of the ownership of the "Webster," he makes a division, in figures, between himself and George S. Wright, of the net earnings of the vessel, and about the same time makes his usual estimate of what he is worth, putting down the "Daniel Webster, $\frac{1}{2}$ of her \$35,000, 60,000," which, of course, was more than the half, but from that period down he, in his estimates, claims the whole of her. And this may be said in reference to the half net earnings, as partitioned between himself and the claimant, that underneath, on the same page, were entries written with a pencil which have been almost utterly obliterated. So little is left as to render it impossible to ascertain what it was before erasure. By whom it was done, is left to conjecture, but if done by the decedent himself, I do not see that it would aid the administrator.

I think, in a case of this kind, and especially where a claim of such magnitude is presented by an executor or administrator, who has sole custody of the books of account, correspondence and documents relating to

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the claim presented, that he should be held to the clearest possible proof of the claim. An air of suspicion naturally gathers around it, which must needs be dispelled before it can be allowed.

This administrator is an alert, shrewd business man. This is apparent from his appearance on the stand and from his letters, and especially those in which he urges his father to make a will. He knew that his father was afflicted with a disease which must prove fatal; he knew of the peculiar relations of "Eliza" to him, and hence in case of his death he clearly foresaw—"anticipated"—the trouble which came, and; therefore, advised and urged his father to make a will. Is it not fair to presume that, if he had a valid claim to so vast an amount against his father, he would have seen to it that it was liquidated and closed during the lifetime of his father?

The explanation which he has given of the oral and written admissions made by him, are entirely unsatisfactory to my mind, and I can hardly believe that a person whose relations to his brothers and sisters were of no more cordial and self-sacrificing a character than ordinarily exist between such near relatives, should, from mere regard, be willing to share what may justly be considered a large fortune, claimed by him, among them. It ill accords with our notions of the selfishness of human nature. The claimant was eagerly pursuing fortune—making money seemed to be his great object in life. He could even express fears that the war of the rebellion would soon be at an end, and thus his prospects for money-making be dimmed. And yet it is soberly and seriously urged that he intended to divide the great sum of two hundred thousand dollars, which he claims clearly belonged to him, into ten equal parts, and bestow nine-tenths upon his brothers and sisters, scattered about the world and settled in life.

The conclusion I have reached upon this claim, I

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find myself unable to resist. The admissions and other evidence, which preclude the recovery of the claim, can only be reconciled with the facts established by the claimant on the theory, either that the deceased, because his son sent him no money to pay for his half of the "Webster," or from some other cause, concluded to retain the whole of the vessel as his own, or that they had a settlement, between themselves, of all matters relating to the ship, during the lifetime of the decedent. Whatever the secret may be, it is in the possession of him who holds the correspondence, books, and papers of the deceased.

The administrator, after the intestate's death, became embroiled with "Eliza," who set up a claim as the widow, and he, undoubtedly, under the advice of astute counsel, originated this claim solely as an effectual mode of depriving her of the fruits of any victory she might expect to reap by the establishment of her alleged rights, well knowing that his claim was a mere pretense; and he then honestly intended, in case his object was attained, to divide the amount of the same, or so much as might be allowed, equally among his brothers and sisters. Some, if not all, of them were informed by him of the object he had in view and of his intentions, and he suggested to at least one of them what would result, if no objection should be made to his account. After the account, however, had been filed and some of the next of kin had prudently and wisely interposed objections, and the claim of "Eliza" as widow had been disposed of adversely, as I have been given to understand, the administrator, seeing, as he perhaps supposed, a chance of success, changed the character of his feigned attack upon "Eliza," into a real one against his brothers and sisters.

It results from the rejection of the claim made to the half net earnings of the "Webster," that the administrator must be charged with the eleven thousand

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seven hundred and twenty-five dollars and seventy cents of the earnings of that ship, collected by him after the death of his father, instead of the half of it only.

The five thousand dollars represented by scrip of the Eleventh Ward Bank, standing in the name of George S. Wright, it seems to me, belongs to the estate. It was purchased by the decedent, evidently paid for by him, and was never delivered to George, but was found, as is to be presumed, among the papers of the deceased after his death; the administrator testifying that he had no knowledge of it until after that event occurred. If it was intended as a gift, it is invalid as such, upon familiar and well-settled principles.

The several items of credit in the schedule of the account "in gold," for sums paid out for the maintenance, education, &c., of the decedent's children, I am inclined to think should be allowed. It is true no vouchers are presented, but they are sworn to by the administrator; the deceased at an early day sanctioned such payments; the children have been supported; and there is no evidence that they derived their support from any other source. On the whole, I am inclined to allow all of the credits embraced in that schedule.

Schedules C and D show that the administrator has paid out, for debts and expenses of administration, the sum of thirty-one thousand one hundred and thirty-nine dollars and fifteen cents; while schedule A of property not inventoried, shows cash received by him to the amount of over forty-eight thousand dollars. Besides, he has received, from time to time, very large sums of money. It appears from the same schedule of the account that, in November, 1868, he received interest on ninety-four thousand dollars in bonds; in 1869, on eighty-two thousand dollars only; in 1870 and from January of that year to July, 1872, on forty-four thousand dollars only; yet he charges himself in

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schedule "A" (Inventory), with these bonds at a valuation of one hundred and seven thousand nine hundred and thirty-four dollars. It does not appear that he ever sold a portion of them at any time prior to July, 1872, or, to the time of making up his account; nor does there appear, from the state of the account, any necessity for such sale. If, on his theory that the estate was largely indebted to him on account of the "Webster" claim, he appropriated fifty thousand dollars of these bonds, or any other amount, to his own use, or, indeed, if he so appropriated it in the absence of any theory, then he should account for the interest. As the matter stands, he must so account. There may be some question as to his liability for other interest money, in consequence of his mingling the funds of the estate with his own; but I have no sufficient data which will enable me to arrive at a satisfactory result.

I have thus endeavored to dispose of all the questions submitted to me in this matter. At the same time, it is possible that something, involved in the intricacies of the case, may have escaped my attention. If so, I will hear the parties in reference thereto, when they come before me to settle the decree, which must be prepared in accordance with the views above expressed.

I will also, at that time, dispose of the question of costs and allowances, about which the parties may wish to be heard.

II. September, 1875.—Application to re-open the accounting.

Clarkson N. Potter, for administrator.

Alex. Thain, for Wm. P. Wright and Abby J. Fleming, next of kin.

George Morris, for John T. Wright, next of kin.

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THE SURROGATE.—Since the above decision was made, this matter has assumed a very remarkable phase.

An application is now made by the administrator, based upon a petition and accompanying affidavits, to re-open the case and permit the administrator to furnish evidence of the payment by him, to the next of kin, of various sums, from time to time, on account of their distributive shares, amounting in the aggregate to one hundred and fourteen thousand four hundred and thirty-four dollars and five cents. The petition states no ground for the application, and the only ground in which there is any force, is stated in the affidavit of the administrator, where he alleges that he did not know it was necessary to include in the account the payments made by him to next of kin.

A schedule containing the alleged payments, with date of each payment, and to whom made, accompanies the petition. The form of the vouchers taken for these alleged payments, judging from the specimens I have seen, is substantially as follows:

“Received of George S. Wright, administrator of John T. Wright, deceased, the sum of \$ on account of my distributive share of said estate.”

The first question to be considered is, whether this court has any power to grant the application. The relief sought is, it strikes me, analogous to granting a rehearing of a case submitted and decided, or a new trial after verdict. Judge DALY has ably summarized the powers of such courts as this, and I quote from his able and celebrated opinion, upon the point under consideration here.

Surrogates' courts have power to “undo what has been done through fraud, or upon the supposition that they had jurisdiction, or on the assumption that a party was dead who is living, or that there was no will; or they may open decrees taken by default, or correct mistakes, the result of oversight or accident, and in

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this state revoke the probate of wills or letters of administration or of guardianship in the cases provided for by statute. These are all powers existing of necessity, and indispensable to the administration of justice, under which may be embraced any other exercise of jurisdiction of a like nature or character. But when, as in this case, all the parties in interest have been represented at the hearing, and the court has given its final sentence or decree, I know of no authority showing that these courts have ever exercised the general power of opening and reversing it again, upon the ground that they had erred as to the law, or had decided erroneously upon the facts."

"There is," however, "in ecclesiastical courts, what is known as 'rescinding a conclusion.' After the case is ended on both sides, and the court has given its conclusion upon the facts, a motion may be made to it to rescind the conclusion and allow the party applying to submit additional evidence. It is allowing the party against whom the conclusion operates to supply evidence, the want of which or insufficiency of which is indicated in the opinion or conclusion of the judge, such as when the proof of the identity of a particular party is not sufficient, or there is any other defect in the proof, the want of which is pointed out by the judge, which application is granted or not, in the sound discretion of the court. It may be made before publication (when the depositions are completed, and a day fixed for the hearing); but if made after, the party must show that the facts came to his knowledge afterwards" (Brick's Estate, 15 *Abb. Pr.* 12, 36, and cases cited. See also *People v. Justices of Chenango*, 1 *J. C.*, 180).

In the case of *Dobke v. McClaran* (41 *Barb.*, 491), the court says, that the power to open a decree, founded in misapprehension or mistake, and re-hear the matter upon the merits, is incident to the statutory power to take proofs and hear and determine the contention,

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and the exercise of this power may be necessary to prevent the greatest injustice ;” and SUTHERLAND, J., declares that motions for such purposes should be viewed with suspicion ; and in the same case, LEONARD, P. J., announces that he is unable to find any authority for granting a re-hearing in a case before the surrogate, when it has been regularly heard and submitted on the merits.

The strongest case for the administrator which I have been able to find, is that of *Campbell v. Thatcher*, 54 *Barb.*, 382. It is, as to some of its facts, very similar to this ; but in the essential ones, bearing upon the point under consideration, quite different. In that case the executors handed over their vouchers to counsel for the preparation of the account. Among them was a receipt for five hundred dollars, paid to a legatee. The counsel, by an oversight, omitted to credit the executors in the account for the five hundred dollars. The error was not discovered until the account was presented, and then, believing, and relying upon the belief, that the amount would be allowed to them on the balance known to be in their hands, going to the person who received such money, they did not ask to have the account corrected, but allowed the error to pass. The surrogate allowed the decree to be corrected and the supreme court sustained his action, on the express ground that it was a mistake or oversight, and as such, bringing the case within the scope of the surrogate's powers, as defined by the court in *Brick's Estate* ; of which case it spoke in terms of strong approval. Indeed, the opinion in that case is often referred to by our ablest jurists and its doctrines, in reference to the extent and limitations of the jurisdiction of surrogates' courts, emphatically endorsed. I think Judge LEONARD was perfectly correct in saying that no case can be found showing that the surrogate has power to grant a re-hearing in a case like this.

The legislature of this state, however, by an act passed in 1870 (*Laws of 1870*, p. 826, § 1), conferred upon the surrogate of the county of New York the same power to set aside, open, vacate, or modify the orders or decrees made by him as is exercised by courts of record of general jurisdiction. Upon no other surrogate in the state has such power been conferred by legislative enactment.

It may be proper to say here, that a decree, taken by default, even, will not be opened except on the application of some one who will be injured if the decree, taken in his absence, is permitted to stand, or unless there be some plain and palpable mistake or error to which the attention of the court is called.

In a case such as this, the court of chancery being a court of record having general jurisdiction, could, in its discretion, grant a re-hearing. In the courts of common law, having like jurisdiction, a new trial could be granted in case of error in ruling by the judge, or misdirection of the jury by him which might have influenced the verdict. Whatever could be obtained in those courts by a re-hearing or a new trial, was obtainable in the ecclesiastical courts only by an appeal. Surrogates' courts, with the single exception above referred to, are not courts of record, and are of inferior and not general jurisdiction. They possess no more power to set aside a decision upon the merits, and grant a re-hearing, than the old courts of common pleas or general sessions had to grant new trials. The supreme court, to which the appeal lies from this court, may, if it think fit, receive additional evidence, which it is said to have done on appeal from the surrogate's decree, in the case of *Ferrie v. Public Administrator* (4 *Bradf.*, 28; 23 *N. Y.*, 90); or it may, I apprehend, send the case back to this, as an inferior court, with instructions to re-hear it (*Devin v. Patchin*, 26 *N. Y.*, 441, per BALCOM, J). The chancellor received

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additional evidence on such appeals in the cases of *VanWyck v. Alley* (1 *Paige*, 552), and *Case v. Towle* (8 *Id.* 579). This power of the appellate tribunal is questioned in the case of *Devin v. Patchin*, on the ground that the court can no longer follow the course of the civil law, since our statute was enacted, regulating such appeals; but, it seems to me, it may still exercise the powers it formerly did, if not prevented by some positive enactment or reasonable implication. But this is beyond my sphere to determine. If this court does not possess the power to grant the relief sought, nor the appellate court power only to affirm or reverse the decrees of surrogates' courts, then it would certainly seem that some legislation on the subject is needed.*

* Since this opinion was prepared I have found that the learned commissioners, appointed to revise the statutes of this state, provide for the very difficulty suggested. In the first place they propose to limit the power of the surrogate as follows :

§ 2289, subd. 11, provides that the surrogate shall have power "to proceed in all matters subject to the cognizance of his court, according to the course and practice of a court having, by the common law, jurisdiction of such matters, except as otherwise prescribed by law ; and to exercise such incidental powers as are necessary, to carry into effect the powers expressly conferred. But no surrogate's court shall grant a re-hearing of any matter, once determined upon the merits, except where the decree or order made thereupon is set aside for some error not affecting the merits, or upon the application of a party in default, who satisfactorily excuses his default."

They next provide a remedy for cases which are thus placed beyond the surrogate's reach, as follows:

"§ 2383. Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact which the surrogate had ; and it may, in its discretion, receive further testimony and documentary evidence, and appoint a referee.

"§ 2384. The appellate court may reverse, affirm or modify the decree or order appealed from, and every intermediate order which it is authorized by law to review, in any respect mentioned in the notice of appeal, and as to any or all the parties ; and it may order a new trial or hearing."

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I am entirely satisfied, from a consideration of the authorities to which I have referred, that I have no power whatever to reconsider this case in any of its aspects, unless, indeed, some fraud, mistake, or error has been committed, of which the administrator has cause to complain, or unless there is ground to rescind the conclusion which I reached upon the merits of the case. In order to ascertain the situation of the matter in these respects, I propose to give a brief *resume* of the history of the case.

The petition for a citation, with a view to a final accounting, was presented to this court by the administrator in the latter part of 1872. He filed a verified account of his proceedings in February, 1873. In the preliminary statement, contained in the account, he refers to "Schedule E, hereto annexed," as containing an account of all moneys paid to next of kin. That schedule is as follows :

"No money has been paid to the next of kin of the deceased," signed "Geo. S. Wright, administrator." Objections were filed by the next of kin, who are represented by counsel in this matter, and testimony was taken from time to time, mainly in regard to the "Webster" claim, of the administrator heretofore disposed of, until the case was finally submitted for the decision of the court in July last, and the decision thereupon made on August 5, following.

In February last, during the progress of the litigation, counsel for contestants, with a view to the introduction of parol evidence of the contents of a draft alleged to have been drawn by one of the next of kin upon George S. Wright, as administrator, for one thousand dollars, which was paid by him, gave written notice to the proctors for the administrator to produce, at the then next hearing, all vouchers for payments made to the next of kin on account of distributive shares. At the next hearing, the administra-

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tor not producing any such vouchers, proof was offered tending to show that the administrator had paid such draft, drawn on him as such, by one of his brothers. Subsequently the administrator, being examined, and taking it to be true that the draft was drawn as alleged, undertook to explain away the effect that might result from his having paid it, and testified, among other things, that he paid it out of his own funds. In his statement, annexed to his application in this matter, I perceive that this one thousand dollar draft, paid to C. E. Williams, for his brother, Wm. P. Wright, is charged as having been paid to him November 7, 1870, "on account of his distributive share of said estate"! There was also a similar question about a draft for six hundred dollars, paid to C. C. Jones for the same brother, which is also contained in the statement. The form of a receipt for Mrs. Fleming, another of the next of kin, to sign, was also offered in evidence. It was in the hand-writing of the administrator, and called for an acknowledgment that she had received from him five thousand five hundred dollars on account of her distributive share of the estate. In my examination of this part of the testimony, in order to a decision of the matter, I looked at schedule "E" of the account, to see if anything was claimed to have been paid to any of the next of kin, and found it contained the statement already recited. Throughout the case, upon this point, the administrator stoutly resisted the idea that he had, in any way, recognized the rights of the next of kin to any part of the assets of the estate by making any payment to them as such. And the large claim made by him showed that, if allowed, he would absorb the whole of the assets, and there would still be due to him upwards of five thousand dollars. The case was submitted to me on the part of the then counsel for the administrator, in an elaborate written argument. It was therein and other-

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wise claimed that the moneys the administrator had paid to Wm. P. Wright were mere loans or gratuities to a distressed or needy brother, and were not paid on account of his distributive share. The argument proceeded upon the theory, having in view the admissions the administrator had made, orally and in his letters, that while he had a just and legal right to the "Webster" claim he would still, after it had once been settled in his favor, divide the amount equally among the next of kin, as a pure gratuity for which he would have the credit, but did not choose to do it upon compulsion. The impression which I derived from the account, the testimony and the arguments of counsel certainly was that he had made no payments to next of kin, but still held in his possession some two hundred thousand dollars of the estate. And now, having failed to establish his large claim, he comes here with vouchers, as he alleges, showing payments made by him as administrator to next of kin, on account of their distributive shares of the estate, amounting, in the aggregate, to upwards of one hundred and fourteen thousand dollars. These alleged payments were made at various times, as shown by his statement, from November, 1868, to August 25, 1875. It was either proven before me, or it was alleged by counsel of the administrator, or both, that the form of the receipts to be taken by him for payments to next of kin, was prepared by his then counsel. In the present application I find it stated in the affidavit of Mr. Thomson, submitted among the papers, "that deponent first became informed in regard to the said payments, and their number and extent, during the pendency of the litigation before the surrogate, arising upon the said account and during a late period thereof, but not even then of the said schedule "E." He does not swear that he did not know of any such payments having been made, or of the existence of any such vouchers,

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prior to the making and filing of the account. That account was on file for more than two years before the case was ultimately decided, and, doubtless, during all that period, the administrator's counsel were in possession of a copy of it. It would, therefore, appear somewhat strange that they should have had no knowledge of schedule "E."

It is also a little remarkable that no one, to judge from the affidavits, is responsible for that unfortunate schedule.

Taking into consideration the fact that George S. Wright held what might fairly have been considered sufficient evidence to establish the "Webster" claim, while, at the same time, he held vouchers for payments made to next of kin to the amount of upwards of one hundred and fourteen thousand dollars, it is quite apparent that two divergent courses to pursue were open before him. One was, to press the "Webster" claim, and ignore the payments to next of kin, as calculated to injure the prospect of recovery, and as a matter of no consequence in case of success; and the other, to claim the credit for payments to next of kin, and thus, ending the "Webster" affair, settle the estate as it should have been settled. The former course would seem to have been adopted.

Of course, the administrator can not allege that he is the victim of any fraud in the premises; nor can he allege the commission of any error or mistake on his part, on the part of the opposite parties, or of the court, so far as the facts show. A mistaken line of policy may have been pursued; but from such a mistake, however disastrous in its results, this court is powerless to relieve. He was in the hands of skillful counsel, who had acted as counsel for his father; they had prepared the form of voucher to be taken; he or they received the vouchers into his or their possession as they were taken, before and during the litigation;

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they fail to show any mistake or error of fact on their part, and Mr. Thomson admits that he knew of the vouchers before the litigation closed. George S. Wright had a certain knowledge of them, nor does he pretend to deny it. I am satisfied that the fact of these payments having been made was purposely suppressed.

As an instance of the fallibility of human evidence, where large interests are at stake, I call attention to the facts, that my decision of the case was made August 5, 1875; that George S. Wright, in his affidavit in this matter, sworn to September 4, testifies "that on August 2, 1875" (in time to have stayed the decision), "deponent for the first time learned that he had signed his name to a schedule, therein called schedule 'E,' containing the following statement:—'No money has been paid to the next of kin of said deceased,'" and on September 6, inst., he made an affidavit before me in which he swears "that he never knew of schedule 'E' and its contents, until September 3, 1875; nor did he know of the same until his attention was called to the same by his counsel on that day." From the facts and testimony in the case, I place no reliance upon the allegation of the administrator that he did not know it was necessary to include the payments to next of kin in the account.

When the fact of these payments to next of kin was, shortly after the decision of the case, disclosed to me, my astonishment was great, and whatever my own views or feelings, in regard to the course pursued, might be, I supposed I had the power, as a court endowed with a certain degree of equitable jurisdiction, to open the case and receive the evidence of these payments, and was then disposed to do so. At the same time, I further proposed to begin the matter *de novo*, and permit the contestants to file such further objections as they might desire. They now suggest that

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they have further evidence which satisfies them that if the decree be entered strictly in accordance with the decision already made, the administrator will still have the advantage. But, since I have examined the cases cited, and finding as facts, that no fraud, error, oversight, or mistake has been committed, I am satisfied my power in the matter is spent, and I must, therefore, deny the application for a re-hearing ; nor can I rescind the conclusion already reached. In my opinion, I pointed out no defect of evidence relating to payments to the next of kin, for the very obvious reason that the administrator offered no proof of such payments ; nor is there any allegation made of the discovery of any new evidence since the decision.

I have carefully considered the authorities and statute referred to by the present learned counsel for the administrator in the case, in the brief submitted by him, but they do not alter my views as above expressed. It is but simple justice to him, to state that he is for the first time in the case on this application, and has no personal knowledge of or connection with the precedent proceeding. An order must be entered denying the application, but with leave to prove any payments made to next of kin, since the case was submitted.

BROWN'S ACCOUNTING.

Before Hon. Owen T. Coffin, Surrogate of Westchester County, December, 1874.

EXECUTORS AND ADMINISTRATORS.—DEVASTAVIT.—
TRUSTEE'S LIABILITY FOR LOSSES.—DISBURSEMENTS
FOR SERVICES.—COUNSEL FEE ON ACCOUNT-
ING.—TRUSTS AND TRUSTEES.—JURISDIC-
TION OF SURROGATE'S COURT.

One of several co-executors or co-administrators can not avoid liability for a loss of the fund, through the misconduct of an agent, on the ground that the others were mainly active in the administration of the estate, and mainly instrumental in passing the fund into the hands of such agent, if he tacitly assented thereto when he had opportunity and reasonable cause to object.

A trustee is himself responsible for the faithful conduct and competency of all his subordinates and assistants, whether strangers, attorneys, or contractors.

The case of *Banks v. Wilkes* (3 Barb. Ch., 99) explained.

The fact that the parties interested in the estate knew of the employment of such agent to make investments, does not preclude them from holding the executor responsible, especially where there is no ground for holding them estopped.

Executors and administrators can not be allowed a disbursement for clerical services in making up the accounts of a deceased agent. It is the duty of the administrator of the agent after his death, as of the agent himself if living, to render such account without charge.

Under the act of 1863 (*Laws of 1863*, Ch. 362, § 8, amending *Laws of 1849*, Ch. 160, § 11, and 2 *R. S.* 93, § 58), the allowance to executors and administrators, for counsel fee on an accounting, may properly include the time spent in preparing the account.

Under 1 *Rev. Stat.* 730, § 68 (5 *Ed.* vol. 3, p. 22, § 87), by which a trust of real property, on the death of the sole trustee, vests in the Supreme Court—the surrogate's court will not take cogni-

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zance of the accounting of a trustee, under a deed of trust, who was appointed by the supreme court. The latter court has exclusive jurisdiction.*

It makes no difference that the trust fund has become mingled with funds for which he is accounting, in the surrogate's court, as executor.

In the matter of the accounting of Benjamin Brown, surviving executor, &c., of James H. Blackwell, deceased.

It appeared from the testimony in this matter that the testator died in 1858, leaving a will by which he provided, among other things, that his executors or the survivor of them should sell and convey his real estate, and should pay out of his estate his debts and funeral expenses and some small legacies. He then gave to Benjamin Brown, one of his executors, the equal third-part of all the rest, residue and remainder of his estate, in trust, to be invested upon bond and mortgage upon real estate, and to pay the interest yearly to his brother, Sidney S. Blackwell, who was also named as one of his executors, during his natural life, with remainder to his children. He then gave to his executors, and the survivor of them, one-third part of the remaining two-thirds of said residue in trust, to invest in the same manner for the benefit of his sister, Harriet Baylies, during her natural life, then to be paid to her children and the children of his sisters Julia A. Rea and Lydia Shepherd, *per capita*. Another one-third of said two-thirds he gave to the executors in manner aforesaid to be invested in like manner, the income to be paid to said Julia A. Rea during life, and then to be divided among the children of all of said sisters, *per capita*.

* If it be a *testamentary* trust, the surrogate's court has jurisdiction (*Laws of 1867, Ch. 782, § 1*; *Laws of 1866, Ch. 115, § 1*, amending *Laws of 1850, Ch. 272, § 1*).

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He then gave the remaining one-third of said two-thirds to the executors to be invested in like manner, the income to be paid to said Lydia Shepherd during life, and then at her death to be divided in like manner among the children of the three sisters.

This will bears date in 1843.

By a codicil bearing date in June, 1858, he ratified and confirmed the will in all respects except that he gave to Mrs. Rea and Mrs. Shepherd, and the survivor of them, the use of a house and lot he owned in Yonkers.

The testator died in 1858, and in the same year the executor, Benjamin Brown, petitioned for citations with a view to the probate of the will, and it was admitted to probate in that year. Both the executors qualified and took upon them the burden of its execution. Smith Barker, Esq., of the city of New York, had been the counsel of the testator in his lifetime, drew the will, was counsel for the executors in proving the same, and acted for them in that capacity afterwards.

In 1864 the executors had an accounting before the surrogate of Westchester county, and by the decree entered therein, it appears that there then remained in their hands about one thousand one hundred dollars in money—a part of the real estate still remaining unsold—and it was adjudged and decreed that said Sidney S. Blackwell was indebted to the estate in the sum of eleven thousand six hundred and eighty-seven dollars. A certificate to that effect was filed in the county clerk's office, and judgment was docketed against him for that amount.

In 1865 Sidney S. Blackwell and those interested, whether by authority from the surrogate does not appear, compromised said judgment, and he paid to the executors nine thousand seven hundred and fifty dollars in full of the same; and he, as executor, and the

other executor, executed a satisfaction piece therefor, and the judgment was cancelled. In the same year a house and lot belonging to the testator, on Broadway, New York, and in which Mrs. Rea had one-ninth interest, held by the testator in trust for certain purposes, was sold by the executors for ninety thousand dollars, of which sum twenty thousand dollars was paid in cash, and a mortgage was taken for the residue, and subsequently thirteen thousand seven hundred and twelve dollars and thirty-three cents of principal was paid thereon, and still subsequently the sum of fifty-six thousand two hundred and eighty-seven dollars and sixty-seven cents—the residue of the principal. The two executors with Mr. Barker, were all present when the judgment was paid and the satisfaction piece given; and also at the sale of the house and lot on Broadway; both the executors executed the conveyance thereof, and were present with Mr. Barker when the payment was made. Mr. Brown executed the deed as trustee of Mrs. Rea, having been appointed by the supreme court to execute the trust in place of the testator. The money, in both instances, as well as the bond and mortgage, went at once into Mr. Barker's hands, none of it passing into the hands of either executor.

The executors had great confidence in the probity and business character of Mr. Barker, and confided the management of the estate to his care.

Shortly after the payment of the judgment referred to, Mr. Barker invested, as a part of the share set apart by the will for the use of Mrs. Baylies, two thousand dollars in United States bonds, which fact became known to the surviving executor shortly thereafter, and to which he made no objection. The husband of Mrs. Baylies also knew and approved of the investment.

In 1866 the executor Sidney S. Baylies died, since which time the surviving executor has had charge of

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the estate, and Mr. Barker continued to act in his former capacity of custodian, making investments and paying over the interest to the beneficiaries. The amount on which Mrs. Baylies was entitled to interest, after the payment of the judgment, was some nineteen thousand six hundred dollars, of which it appears seventeen thousand six hundred dollars was invested as directed by the will, and the two thousand dollars in United States bonds. The interest on these several sums was paid separately and in different ways—on the former by check of Mr. Barker, conveyed by Mr. Brown to Mrs. Baylies, and the latter, also by check of Barker, directly to Mrs. Baylies through her husband or other members of the family. This state of things continued until the death of Mr. Barker, which occurred in June, 1872. It was subsequently ascertained that his estate was insolvent, and that he, in fact, had been insolvent from about or before 1866 down to his death. He had used for his own purposes about six thousand dollars of the funds of the estate, besides the two thousand dollars of United States bonds which could not be found among his effects. The executor charges himself with the six thousand dollars in his accounts, but denies his liability for the two thousand dollars.

This executor credits himself with two thousand five hundred dollars paid to the administrator, &c., of Mr. Barker, for the legal services of the latter in the management of the estate. This item is objected to by the contestants. No voucher for it is produced, but the executor, and the administrator of Mr. Barker fixed upon this sum as the value of the services, and appeal to the testimony in the case to sustain them. No charges, however, were found upon the books of Mr. Barker for any services, and it appears that he retained commissions at the rate of one per cent. on the interest and on other moneys paid to beneficiaries, and that he

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paid some commissions as such to the executors, but the sums so retained largely exceed those paid over. The executor alleges, in the statement appended to his account, that nearly all the moneys received and disbursed relating to the estate, were so received and disbursed through Mr. Barker; and he retained commissions thereon amounting to about two thousand three hundred dollars, while he paid over to the executors, on account of such commissions, about seven hundred and forty-two dollars.

The executor makes a charge of two hundred and fifty dollars against the estate for services of an accountant, in making up the account, which is objected to.

Mrs. Rea owned one-ninth of the house and lot known as 196 Broadway, the other eight-ninths being owned by her brother, the testator. During his lifetime, in 1841, she conveyed it to him as trustee, with power to him, his heirs and assigns, to sell and convey the same, and to execute certain other trusts. Previous to the sale of the property, already referred to, Mr. Brown was, by the supreme court, appointed to execute the trust in place of the testator, and executed the deed of the premises by virtue of such appointment. The whole of the proceeds, including Mrs. Rea's share, went into the hands of Mr. Blackwell's executors, and Mrs. Rea's share became thus intermingled with the moneys of the estate, and entered into the account filed in this matter. Counsel for legatees object that the surrogate has no jurisdiction to adjudicate in reference to that trust.

D. M. Helm, for executor.

A. D. Ditmars and *Mr. Freeman*, for Julia A. Rea and Harriet H. Baylies and their children, legatees.

Francis Lawton, for Eliza W. Turner, legatee.

THE SURROGATE.—The only questions submitted for consideration are as to whether the executor is liable for the loss of the two thousand dollars of Mrs. Baylies' share, invested in government bonds and lost ; whether he shall be allowed, as a credit, the sum of two thousand five hundred dollars for the professional services of Mr. Barker ; whether he shall be allowed the item of two hundred and fifty dollars for money paid for clerical services, and whether this court has jurisdiction so far as relates to the Mrs. Rea trust.

The counsel for the executor insists that the latter is not liable to make good to the estate the loss occasioned by the disappearance of the two thousand dollars invested in the bonds, 1. Because it was the *devastavit* of his co-executor ; and 2. Because the beneficiary for life concurred in the making of the investment, in that manner, by the attorney of the executors, and is, therefore, estopped from claiming its restoration to the fund by the surviving executor. These, at least, I understand to be the grounds he takes.

It is undoubtedly a sound legal rule that one executor or trustee is not responsible for the wrongful act of his co-executor or trustee where he does not assent, or contribute, thereto, or concur therein. *Sutherland v. Brush* (7 *Johns. Ch.*, 17), and the converse of the proposition is equally well settled. But, I apprehend, this case does not present the question as to whether one executor is liable, under a given state of facts, for the *devastavit* of his co-executor.

Mr. Barker appears to have been the trusted counsel of the deceased and of his executors. He was regarded by them,—by some, if not all, of the beneficiaries,—and, perhaps, by all who knew him, as a man of integrity, and skilled in affairs. His career presents no new phase of life or character. A genial, kindly, care-

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less, improvident man, trusted by everyone, and unworthy of such trust. The executors, therefore, very naturally entrusted him with the management of this large estate. I look in vain for evidence of any facts tending to show that one of the executors more than the other contributed to the placing of the funds in his hands and under his management. The proceeds of the judgment against Sidney S. Blackwell and the twenty thousand dollars cash, as part proceeds of sale of 196 Broadway, and the seventy thousand dollar mortgage, seem to have all passed at once into his hands. There is no more evidence that the deceased executor received any of the money, than there is that the surviving executor did. It was taken by Mr. Barker by their mutual consent. In fact, S. S. Blackwell's share, over which he had no control as executor, must have passed into Barker's hands by the assent only of Mr. Brown, as he was sole executor and trustee as to that share. They were both present when the Blackwell judgment was paid, and executed a satisfaction piece for the same. Again they were both present at the sale of the Broadway property, and executed a conveyance thereof when the twenty thousand dollars was paid, and the seventy thousand dollar mortgage was given. It is probable that Mr. Brown deferred somewhat in the conduct of the affairs of the estate to his co-executor, who was a brother of the deceased. But Mr. Brown had been a business partner of the deceased, and he knew that the testator especially desired that he should aid in managing the estate; and he also must have known the further fact, which I gather from the evidence before me, that Sidney S. Blackwell was somewhat improvident in the management of his own affairs. It was therefore plainly his duty to interpose, when he had reason to apprehend loss to the estate, and prevent it, if possible. But no one, at the time of Sidney's death, seems to have suspected there was

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danger of any such loss. The executors equally contributed to the placing of the funds in the hands of Mr. Barker, as I have endeavored to show, and it appears to me clear that Mr. Brown is just as much liable for the two thousand dollar *deceit* as if he himself had invested the amount improperly and lost it. The maxim "*qui facit per alium, per seipsum facere videtur*," I can but regard as applicable here. Shortly after the purchase of the bonds, in violation of the directions in the will, Mr. Brown knew of the investment. There is no evidence that he made any objection, and his assent must be presumed. Indeed, for six years after the fact came to his knowledge, he acquiesced in the mode of investment, and made no effort to restore the money to the purposes of the trust (*Styles v. Guy*, 1 *Much. & Gord.*, 422).

That Mrs. Baylies assented and received the interest directly from Mr. Barker, through her husband or Miss Harriet S. Baylies, her daughter, can make no difference, in so far as the loss is concerned. There is no foundation for an *estoppel in pais*. She was not *sui juris* (*Penman v. Slocum*, 41 *N. Y.*, 53).

The loss to the fund did not occur *because* of the investment in a mode not authorized by the will, but as a result of the insolvency of the agent. Mrs. Baylies is only interested in the fund during her life, and neither her consent nor the consent of her children, as to the mode of investment, and the person by whom it was invested, can, in any event, affect those entitled to the fund at her death. Mrs. Baylies probably knew very little about the affairs of the estate and their management. She was not familiar with business matters, and relied, doubtless, upon those upon whom the law devolved the responsibility in that regard, and the law is invoked for the protection of her rights, and it should not fail her.

Some stress is laid upon the fact, by the counsel for

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the executor, that Mr. Brown, after the death of his co-executor, repeatedly called on Mr. Barker to render to him a statement of the condition of the estate, and that Mr. Barker put him off and evaded his requests, as evidence to show that the executor strove to do his duty. Ordinarily, this conduct of the agent would tend to excite suspicion, and was a just ground for the exercise of vigilance on the part of the executor. If the conduct of Mr. Barker, in this respect, caused a passing apprehension of something wrong, it was doubtless allayed by the reflection that he was a man of high character. But, after all, I can not see, in the view I take of the case, that this point is entitled to any weight. Mr. Barker, after the death of the co-executor, became the agent of the surviving one, and he must be held responsible for his acts. It results from the very nature of the office of a trustee that it can not be delegated to others, being of a strictly personal and fiduciary character (*Turner v. Corney*, 5 *Beav.*, 517). So that the trustee is himself responsible for the faithful conduct and competency of all his subordinates and assistants, whether strangers, attorneys, or contractors (*Lewin*, 2045; *Chambers v. Minchin*, 7 *Vesey*, 196; *Langford v. Gascoyne*, 11 *Id.*, 333; *Robertson v. Armstrong*, 28 *Beav.*, 123). Mr. Brown recognizes his liability for the other loss of six thousand dollars. I fail to discover any distinction as to the manner in which that sum and the two thousand dollars were lost that can in any way enure to the benefit of the executor.

Counsel for the executor has submitted a very able brief, and has, among other things, called attention to the case of *Banks v. Wilkes* (3 *Barb. Ch. R.*, 99). The facts in that case are substantially as follows: Charles Wilkes was banker for James Campbell, who died leaving funds in the banker's hands. By his will he made his sister, Miss Campbell, sole legatee and ex-

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ecutrix. Wilkes then acted as *her* banker, and invested of the funds which the testator had in his hands at his death, fifteen thousand dollars on bond and mortgage for Miss Campbell. Wilkes died leaving a will in which he appointed an executrix and executors, of whom Horatio Wilkes was one, and the bond and mortgage came into his hands among the other assets of his testator. He rendered accounts to Miss Campbell headed "with estate of Charles Wilkes," and he repeatedly gave his written acknowledgment that *he* held them for her. She received the income from him. He afterwards received and lost six thousand dollars of the fund, and died insolvent.

All the executors assented that Horatio should take and manage *the estate of his father*, and Miss Campbell's fund thus came into his hands. The assistant V. C. says: "I do not discover any breach of trust in this circumstance. There is no proof that the defendants *agreed to intrust the control and management of Miss C.'s securities to Horatio*. They were simply *passive, suffering* them to pass into his custody." I do not perceive any analogy between that case and the one under consideration. Here the agent is not one of the executors, as was the fact there, nor was the executor "simply passive" in the disposition of the funds, any more than was his co-executor. Both concurred in the mode in which the estate was managed. As the surviving executor was sole executor of Mr. S. S. Blackwell's share of the estate, and as that share went into Mr. Barker's hands, the conclusion is irresistible that it went there with the full knowledge and assent of Mr. Brown. At all events, there can be no reasonable doubt that all of the funds of the estate were received by Mr. Barker with his full knowledge and assent, and it is certain that they remained there for six years after he became sole executor, with his like full knowledge and assent. If he did not origin-

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ally take any active part in placing the funds in Barker's hands, he permitted him to receive, in 1868, two years after the death of his co-executor, the large balance of about fifty-six thousand dollars due on the seventy thousand dollar mortgage, and to manage and control the funds of the estate as his agent. I do not think the fact testified to by the executor, that all the parties wished Mr. Barker to manage the estate, entitled to much consideration. The language of the witness was very general, but even if he could have specified every one of those interested, it could scarcely avail him. There were married women and children, among others, interested in a nearer or more remote degree; and many of them. They could suggest and advise, and the executor could adopt or reject, as he saw fit. The responsibility was upon him. It would have been a clear violation of duty for him to follow crude suggestions leading to disaster. Still, in a proper case, he might avail himself of an *estoppel*; but, as has already been remarked, I see no facts upon which he can base one in this case. It results from these views that the executor can not escape liability for the two thousand dollars. It should be restored to the fund, and Mrs. Baylies has a right to such interest thereon as has not already been received by her from Mr. Barker. It appears that his last payment of interest was in January, 1872.

The credit claimed by the executor for two thousand five hundred dollars, paid to the administrator of Mr. Barker, for legal services rendered by the latter, must be disallowed. By the evidence it is shown that Mr. Barker from time to time, as extraordinary services were rendered, received pay therefor. In simply receiving and paying over the interest and other moneys, he retained commissions which belonged to the executors. As nearly as I can ascertain the amount so received, it was about two thousand three hundred dollars, besides

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what he retained from the interest on the United States bonds, while he paid over to them only some seven hundred and fifty dollars. It would seem, therefore, that he thus paid himself at least one thousand five hundred dollars. If he had any legal claim against the executors, it is a little remarkable that no charges of the kind were found upon his books. The fair inference is, that in some way he was fully paid.

The other item of credit for two hundred and fifty dollars paid for clerical services in making up the account, must also be disallowed. Mr. Barker was agent for the executors. Had he been alive to render his account to his employers, he could have made no legal charge for such a service. It would have been a simple duty he owed them, to render an account of his stewardship; and the fact that his accounts were kept so loosely and carelessly as to have made the labor a very serious one, was a matter of which he could not reasonably complain. In this respect his administrator stands precisely in his place, and as his legal representative it was his duty, without charge, to furnish such account.

As to the counsel of the executor in this proceeding, however, the matter is different. It was formerly held that an executor could not be allowed any charges for making up his account, but by the act of 1863 it is declared that on every accounting the surrogate shall allow to the executor, for services of counsel in preparing for and attending upon the accounting, not to exceed ten dollars per day. I think that the making up of the account is fairly embraced in this provision. In many, perhaps most, cases, the only preparation is in making out the account. The executor will be allowed for such services when the proper evidence shall be presented.

I think this court has no right to take cognizance of the separate fund in which Mrs. Rea is interested as

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cestui que trust. The trust relates solely to real estate. At common law, on the death of the trustee, it would have devolved on the heir (*Attorney-General v. Lady Downing, Wilmot's Opinions*, 21; *Berrien v. McLane, Hoffm.*, 421). In *Hall v. May* (3 *Kay & J.*, 585), it was held that "where the deed of settlement devolves upon the trustee, *his heirs or assigns*, it has finally been considered that this implies that the trustee may devise the estate to any one he *may deem more fit* to execute the trust than the heir, and that such devisee may not only hold the legal estate, but also execute the trust." This was so held where the common-law rule prevailed. By our statute of uses and trusts, however, it is provided that "upon the death of the surviving trustee of an express trust, the trust estate shall not descend to his heirs, nor pass to his personal representatives; but the trust, if then unexecuted, shall vest in the supreme court, with all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court" (3 *R. S.* 22, § 87, 5th ed.). The common-law doctrine has thus been abrogated (*Hawley v. Ross*, 7 *Paige*, 103; *Glen v. Gibson*, 9 *Barb.*, 634; *Bunn v. Vaughan*, 1 *Abb. Ct. App. Dec.*, 253; *Milbank v. Crane*, 25 *How. Pr.*, 193). The trust was unexecuted when the testator died, and at his death vested at once in the supreme court. That court, in the discharge of its duty, appointed Mr. Brown to execute the trust, and it has sole and exclusive jurisdiction over him, his conduct and accounts.

In view of the alleged difficulty of adjusting the accounts properly, because of the intermingling of the two funds, it is suggested that it is doubtless competent for Mrs. Rea in so far as her separate trust is concerned, to acquiesce in the result of this accounting, if she shall be so advised.

A decree must be entered in accordance with the views above expressed. December 21, 1874.

DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN THE FOLLOWING

STANDARD NEW YORK REPORTS

Issued during the period covered by this volume :

VIZ.—16 ABBOTT'S PRACTICE REPORTS; 54, 55, 56, 57, 58, and 59 NEW YORK REPORTS; and in THE LAWS OF 1874 AND 1875; with a selection of the important cases of practice in 1, 2, 3, 4, and 5 HUN, and 47, 48, and 49 HOWARD'S PRACTICE REPORTS, and 7-11 ENGLISH REPORTS (Moak's Edition.)

ABATEMENT AND REVIVAL.

1. The death of the mortgagor after entry of a judgment of foreclosure and sale, without a provision as to a deficiency, makes revivor necessary before the execution of the judgment. [3 Edw., ch. 394.] *Ct. of Appeals*, *Hays v. Thomae*, 56 N. Y., 521.
2. The judicial dissolution of a corporation, and the appointment of a receiver, abates a pending action against it unless a continuance is actually ordered. L. 1832, c. 295, only gives the court power to make an order for the continuance of such an action. Section 121 of the code, providing that actions shall not abate in case of disability, does not authorize continuing the action without bringing in a successor or representative. *Ct. of Appeals*, 1874, *McCulloch v. Norwood*, 58 N. Y., 562.
3. Action for breach of promise, finally abates by death. *Wade v. Kalbfleisch*, *Ante*, 104.
4. Revival by representatives of deceased partner can not be retracted after judgment. *Arthur v. Griswold*, *Ante*, 235.

ABSENCE UNEXPLAINED.

Supreme court may appoint trustee of estate of person having domicile in this state who is absent and unheard from for three years before application, or who suddenly or mysteriously disappears under such cir

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cumstances as to give reasonable ground to believe that he is lost, insane, and can not be found, or dead, or has been made away with:— and support of family and payment of judgment creditors may be provided for. *L.* 1875, p. 597, c. 519.

ACCOUNTING.

1. The referee (appointed to state an account where defendant did not answer) may state the account down to the time of the hearing [3 *Atk.*, 582, 591; 17 *Conn.*, 556.] *Ct. of Appeals*, 1874, *Darling v. Brewster*, 55 *N. Y.*, 667.
2. In an action for an accounting between joint owners of a vessel,—*held*, that judgment for the plaintiff could not be sustained without ascertaining the account of each joint owner with the common fund in the hands of one of the defendants who was as much the agent of the plaintiff as of the others. *Ib.*

ACKNOWLEDGMENT OF DEEDS.

An act to authorize appointment of commissioners in other states and foreign countries. *L.* 1875, p. 119, c. 136; superseding *L.* 1850, p. 582, c. 270; *L.* 1858, p. 498, c. 308; *L.* 1862, p. 478, c. 283.

EVIDENCE.

ACTION.

1. An action of an equitable nature lies to cancel a policy of insurance obtained by fraud, where no action on the policy is pending. *Supreme Ct. Sp. T.*, 1874, *Globe Mut. Life Ins. Co. v. Reals*, 48 *How. Pr.*, 502.
2. The fact that an action is for money is not conclusive that it is not of equitable cognizance; it may be sustained as such on the ground that the payment of money is a performance of the contract. *Rindge v. Baker*, 57 *N. Y.*, 209.
3. The rule that the court is not confined to the relief asked in the complaint, and may give any other consistent with the case stated and proved, does not authorize judgment in direct hostility to the theory of the action and the substantial allegations of the complaint. *Com. of Appeals*, 1874, *Graham v. Read*, 57 *N. Y.*, 681.
4. The annexing of fixtures to real estate,—*held*, even if a bar to an action for the recovery of the fixtures, no bar to an action for the conversion. *Ct. of Appeals*, 1874, *McEntee v. Harrison*, 58 *N. Y.*, 654.
5. Action for breach of promise, not “founded on contract.” Its nature explained. *Wade v. Kalbfleisch*, *Ante*, 104.
6. Action for tort against partners, severed on the death of one. *Arthur v. Griswold*, *Ante*, 235.

CAUSE OF ACTION; PLEADING.

AMENDMENT.

ADVERTISEMENTS.

1. Every notice or advertisement of legal proceedings required by law to be published in one or more papers in the city of New York, to be published in the daily law journal designated by the presiding and chief justices of the First District. *L. 1874, c. 656* (printed in the vol. of *L. 1875, p. 4*).
2. Surrogates' notices and citations (except in New York and Kings) to be published in a newspaper in the county, if there be one, instead of in the state paper; if any party resides out of the county, and the property of the deceased exceeds \$2,000, then in the state paper also; if property of deceased does not exceed \$2,000, publication in the state paper shall be at discretion of the surrogate, and without charge. *L. 1874, p. 557, c. 487*.

AFFIDAVIT.

ACKNOWLEDGMENT.

AMENDMENT.

1. The amendment of course of an answer which does not require a reply, and is not replied to or demurred to, must, though the answer was served by mail, be made within twenty days after service. *Toomey v. Andrews, 48 How. Pr., 332*.
2. In an action for the recovery of personal property, an amendment was allowed at the trial after motion to dismiss the complaint, by inserting therein the words "by forcibly taking from the plaintiffs," immediately after the allegation that defendant was possessed of plaintiff's goods. *Held* proper, and not reviewable upon appeal. [23 *N. Y.*, 357.] *Ct. of Appeals, 1874, Simmons v. Lyons, 55 N. Y., 671*.
3. *Held* also, that such amendment dispensed with allegation of a demand by plaintiffs before bringing suit. *Ib.*
4. In an action for specific performance of a covenant in a lease, where the covenant and the failure to perform it were pleaded, if the covenant is not one of which specific performance may be decreed, still the court may, upon such terms as are just, allow an amendment of the pleadings so that a legal remedy may be had, especially if from the lapse of time the statute of limitations may bar another action. *Ct. of Appeals, 1874, Beck v. Allison, 56 N. Y., 366; reversing 4 Daly, 421*.
5. An omission of the complaint to aver a necessary fact which appears by the answer, may be supplied, or treated as if supplied, even after appeal to the court of appeals; [11 *N. Y.*, 237; 21 *Id.*, 313.] *Ct. of Appeals, 1874, Haddow v. Lundy, 59 N. Y., 320*.

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6. Amendment affecting the issue, not a matter of form, but of substance. *McGraw v. Godfrey*, *Ante*, 358.
7. Adult not allowed to amend by alleging he was an infant when he contracted. *Ib.*
8. Amendment of complaint may be allowed after new trial has been granted. *Steinfeld v. Levy*, *Ante*, 26. And see *Hauck v. Craighead*, 4 *Hun*, 561.
9. Change of judges does not prevent the general term from amending the record to conform to the decision actually rendered by it. *Com. of Appeals*, 1874, *Buckingham v. Dickinson*, 54 *N. Y.*, 682.
10. In an action to set aside a judgment confessed in favor of defendant, where he prayed in his answer to have the verification of the statement to the judgment which was made on information and belief only, amended,—*held*, that such amendment could be allowed by the referee. *Ct. of Appeals*, 1873, *Cook v. Whipple*, 55 *N. Y.*, 150.

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1. *In general.*

1. No appeal lies from an order or judgment taken by default. [13 *Johns.*, 561.] The remedy is to apply to have the default opened or the order or judgment set aside. *Com. of Appeals*, 1873, *Flake v. Wagenen*, 54 *N. Y.*, 25.
2. The amendment of § 348 of the Code of Procedure, made by *L.* 1851, p. 900, ch. 479, which provides for an appeal to the general term from a judgment entered upon the report of referees or the direction of a single judge *in all cases*, must be taken to embrace only cases of entries of judgment after hearing the parties and examining the issues. *Id.*
3. Judgment entered for want of an answer, after motion to strike out the answer served was granted by default, is not appealable. *Ct. of Appeals*, 1874, *Innes v. Purcell*, 58 *N. Y.*, 388; affirming 1 *Hun*, 318.
4. The rule prohibiting appeals from judgments and orders by default applied, although the default was suffered in deference to decisions subsequently overruled. *Ct. of Appeals*, 1874, *Miller v. Tyler*, 58 *N. Y.*, 477.
5. Under a statute declaring the decision of the general term final, unless an appeal be allowed by it, such allowance is within the discretion of that court, and its refusal of an appeal can not be reviewed by the court of appeals. *Ct. of Appeals*, 1874, *People ex rel. Grissler v. Fowler*, 55 *N. Y.*, 675.
6. A special term order which affects a substantial right, *e.g.*, an order giving leave to sue on a judgment between the same parties, although

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- involving questions of discretion, is appealable to the general term; and a refusal to entertain the appeal and pass upon the merits is an error of law, reviewable in the court of appeals. [29 N. Y., 418; 10 Abb. Pr., N. S., 416; 53 N. Y., 322.] *Ct. of Appeals*, 1874, Hanover Fire Ins. Co. v. Tomlinson, 58 N. Y., 215; reversing 2 *Supreme Ct. (T. & C.)*, 657.
7. The granting of an extra allowance in an action for an accounting, &c.,—*held*, discretionary. *Ct. of Appeals*, 1874, Darling v. Brewster, 55 N. Y., 667.
 8. One not a party to the proceeding at special term, though recognized without objection at general term, can not appeal to the court of appeals from a mere affirmance. *Com. of Appeals*, 1873, People *ex rel.* Lee v. Lynch, 54 N. Y., 681.
 9. A bankrupt, seeking to prevent the establishment of a claim against himself, has an interest sufficient to entitle him to appeal, especially where the judgment against him includes costs incurred after the bankruptcy. [Distinguishing 9 Wall., 664.] *Ct. of Appeals*, 1874, Sanford v. Sanford, 58 N. Y., 67.
 10. The sureties in an undertaking on appeal from special to general term, conditioned to pay "all costs and damages which may be awarded against him (the appellant) on said appeal" are not liable for costs and damages awarded in the court of appeals on a subsequent appeal by their principal from a judgment of affirmance recovered at general term. Otherwise where the special term judgment was reversed by the general term, but reinstated in the court of appeals. [25 N. Y., 484.] It would be enlarging the liability of the sureties to hold them liable upon a further appeal when the judgment was affirmed on the appeal for which they undertook. *Ct. of Appeals*, 1874, Hinckley v. Kreitz, 58 N. Y., 583; overruling in effect, 47 *How. Pr.*, 286.
 11. Liability of sureties on an appeal which delays satisfaction of the judgment to the prejudice of one who stands in position of a surety for the judgment debtor. Barnes v. Mott, *Ante*, 57.
 12. Proceeding under an order, not to enforce it, but to resist an unfavorable result under it, is not a waiver of the right to appeal from it. *Ct. of Appeals*, 1874, Barker v. White, 58 N. Y., 204.
 13. One who has resisted an appeal from a part of a judgment which is in his favor, and entered judgment on the remittitur, waives his right to appeal from the part which is against him. *Ct. of Appeals*, 1874, Genet v. Davenport, 59 N. Y., 648.
 14. Delay in moving to dismiss, which might be deemed to be suffered by mutual consent,—*held*, not laches. Hill v. Hermans, 59 N. Y., 396.
 15. Tardy appeal dismissed though due service of notice was admitted by attorney. Waring v. Senior, 48 *How. Pr.*, 226.

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16. A general objection that an order of the commissioners of highways had been shown, does not avail to sustain the more specific objection on appeal, that the genuineness of signatures was not proved, and that one of these commissioners was absent. *Com. of Appeals*, 1873, *Chapman v. Gates*, 54 N. Y., 132.
17. An objection at the trial, that a question to a witness was irrelevant and immaterial,—*held*, not to make available on appeal the objection that it was in impeachment of the party's own witness to whom it was put. *Com. of Appeals*, 1874, *First National Bank of Cincinnati v. Kelly*, 57 N. Y., 34.
18. An objection to evidence on the ground that it was incompetent under § 399 of the code, does not avail to raise the objection on appeal, that it was incompetent as declarations of a third person. *Ct. of Appeals*, 1874, *Cary v. White*, 59 N. Y., 336.
19. Counterclaim or offset against affirmative relief awarded defendant, is not available when first claimed on appeal. *Blake v. Buffalo Creek R. R. Co.*, 56 N. Y., 485.
20. The objection is not available on appeal that the defense litigated without objection below was not set up in the answer. [54 N. Y., 577.] *Com. of Appeals*, 1874, *Williams v. People's Fire Ins. Co.*, 57 N. Y., 274.
21. The rule that the specification of the ground of objection to evidence is essential, does not apply where there was no cause of action alleged which authorized the evidence. *Com. of Appeals*, 1874, *Larned v. Hudson*, 57 N. Y., 151.
22. The question whether a point raised in the appellate court was raised below, may be determined by the court, not merely from the pleadings, but by resorting also to the case made, the findings, and the exceptions. *Ct. of Appeals*, 1874, *McKecknie v. Ward*, 58 N. Y., 541.
23. A party who requested the referee to make a finding of fact, not allowed to object to the finding on appeal. *Com. of Appeals*, 1874, *East River National Bank v. Gove*, 57 N. Y., 597.
24. Where the same state of facts is presented upon a second as upon the first appeal, this court will not review the grounds of the former decision to pass upon a question then in the case, but to which attention was not called by counsel. *Ct. of Appeals*, 1874, *Joslin v. Cowee*, 56 N. Y., 626.
25. In an action for the foreclosure of a mortgage of leasehold interests, where the mortgage complained upon described the interests in general language, and the pleadings disclosed what premises were leased, and the terms,—*held*, that the leases, or the record of them, could properly be read and considered upon appeal to the

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- court of appeals, though not read in the court below. [2 Sandf., 718 ; 40 Barb., 449, 455 ; 45 N. Y., 166, 168.] *Com. of Appeals*, 1874, *Catlin v. Grissler*, 57 N. Y., 363.
26. A judgment of foreclosure and sale under a mortgage of leasehold interests directed that after deducting liens for taxes and assessments, and all rents due by the mortgagor, the sheriff pay the plaintiff, &c.,—*held*, that appellants from such judgment, who waived all claim for an absolute reversal, could not ask for a mere modification of the directions for the application of the proceeds, since such a mode of sale enhanced the value of the appellant's interest. *Ib.*
27. Under a complaint by a pledgee, in form, to recover the possession of the personal property pledged, but, *it seems*, claiming the amount due the plaintiff on the debt for which the pledge was collateral, the verdict was for the amount of the claim simply, and the judgment an absolute one therefor, instead of in the alternative.—*held*, that no question having been made as to the form of the verdict, the judgment, at the option of the defendant, might be modified by directing a return of the property, with all the costs in all the courts, or the judgment might be affirmed with costs. [9 N. Y., 559.] *Com. of Appeals*, 1874, *First National Bank of Cincinnati v. Kelly*, 57 N. Y., 34.
28. On reversing a judgment, a new trial should be ordered, unless there could be no possible state of facts upon which the action could be sustained. *Com. of Appeals*, 1874, *Stowell v. Hazlett*, 57 N. Y., 637, reversing 5 *Lans.*, 380 ; *Hall v. Erwin*, 57 N. Y., 643 ; reversing 60 *Barb.*, 349.
29. Judgment may be supported by facts which the evidence tended to prove, if not inconsistent with facts found. *Ct. of Appeals*, 1874, *Townsend v. Bargy*, 57 N. Y., 665.
30. Though the admission of illegal evidence is presumptively injurious to the party objecting to it, when this presumption is repelled beyond a rational doubt, the error furnishes no ground for reversal. [35 N. Y., 59 ; 36 N. Y., 644]. *Com. of Appeals*, 1873, *Anderson v. Rome, &c., R. R. Co.*, 54 N. Y., 334.
31. Any illegal evidence that would have a tendency to arouse the prejudices or sympathies of the jurors, or to influence their judgments, can not be regarded as not injurious ; nor can it be where the party objecting to it is obliged to call a witness to explain or contradict it. *Ib.*

II. Appeal to the Court of Appeals.

32. No appeal shall be hereafter taken to the court of appeals from any judgment or order granting or refusing a new trial where the amount of the judgment or subject-matter in controversy is the

- action or proceeding does not exceed five hundred dollars, exclusive of the costs therein, unless the general term of the court from whose decision or determination such appeal shall be taken, shall, by an order to be entered in its minutes, state that there is involved some question of law which ought to be reviewed in the court of appeals. In actions not founded upon contract, where the judgment appealed from is for the defendant, the amount claimed in the complaint shall be deemed the amount of the subject-matter of the controversy. But nothing in this provision contained shall apply to actions or proceedings affecting the title to real estate, or an interest therein. *L. 1874, p. 378, c. 322.*
33. The above act includes a judgment of affirmance. *Ct. of Appeals, 1874, Butterfield v. Radde, 58 N. Y., 489.*
34. It is not limited to judgments "granting or refusing a new trial," these words relating to the previous word "order" only. *Ib.*
35. Leave under the act may be sought by motion at any general term within the department, within two years after notice of the judgment. *Supervisors of Richmond v. Van Clief, Ante, 97.*
36. A judgment of reversal by the general term, determining the principles and rule by which such reversal was to be made effective, and directing further proceedings necessary to perfect the judgment, is not a final determination from which an appeal lies to the court of appeals, until such further proceedings are had. *Com. of Appeals, 1874, Catlin v. Grissler, 57 N. Y., 363.*
37. A notice of appeal that it was from the judgment rendered at a certain date, giving the date of the completion of the further proceedings, is sufficient to bring up the judgment of a general term. *Ib.*
38. It is irregular to enter a judgment of the general term, and appeal to the court of appeals until all the appeals to the general term affecting the same judgment are disposed of. *Com. of Appeals, 1873, Muldoon v. Pitt, 54 N. Y., 269; affirming 4 Daly, 105.*
39. The remedy for irregularity in this respect, however, is a motion to vacate or set aside such judgment without waiting till the cause is moved for argument in the court of appeals before objection. *Ib.*
40. An order opening a sale upon a judgment of foreclosure rests in the discretion of the court below, and is not appealable to the court of appeals. *Ct. of Appeals, 1874, Crane v. Stiger, 58 N. Y., 625.*
41. This discretionary power is not terminated by an order confirming the report of sale, and the delivery of the referee's deed to the purchaser. *Ib.*
42. The fact that no notice of motion was served upon the purchase does not invalidate the order opening the sale, where he had actual notice, and appeared and contested the motion. *Ib.*
43. So of an order refusing or reversing an order granting leave. 1874, *Depew v. Dewey, 56 Id., 657.*

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44. The right to costs is substantial, and when claimed by the positive provision of statute does not involve any question of discretion ; and an order denying them in such a case is appealable to the court of appeals. [Code of Pro., § 11.] *Ct. of Appeals*, 1874, *Sturgis v. Spofford*, 58 *N. Y.*, 103.
45. The discretion to award costs of appeal, where the judgment is affirmed in part and reversed in part (§ 306), is given only to the appellate court which thus modifies the judgment, and only as to the costs in that court. *Id.*
46. The right to appeal from an order granting a new trial given by section 11 of the code (subd. 2) does not apply to an action brought by the attorney-general in behalf of the people to oust the defendant from office, and to establish the right of the relator to it, because neither adverse claimant has authority to conclude the right of the people by the stipulation for final judgment. *Ct. of Appeals*, 1874, *People ex rel. Judson v. Thacher*, 55 *N. Y.*, 525 ; dismissing appeal from 1 *Supreme Ct. (T. & C.)*, 158 ; *S. C.*, 7 *Lans.*, 274.
47. Appeal from judgment on verdict taken subject to opinion of general term, must be dismissed, unless statement is filed with judgment-roll. *Reinmiller v. Skidmore*, 59 *N. Y.*, 661.
48. An appeal to the court of appeals does not lie from an order denying a motion to issue a commission rogatory on discretionary grounds. Orders in respect to practice which involve any question of discretion are not appealable to this court. *Ct. of Appeals*, 1874, *Anonymous*, 59 *N. Y.*, 313.
49. An order refusing to vacate a judgment or order which is void for want of jurisdiction, and which the party is actually endeavoring to enforce, affects a matter of absolute right, and an appeal lies to the court of appeals. *Ct. of Appeals*, 1874, *Kamp v. Kamp*, 59 *N. Y.*, 212.
50. Where the order below stated that the motion was denied " on the ground that the court had no power to grant the same, and on the other ground stated " (other grounds of discretion being stated in the opinion rendered by the judge) ; and at a general term, held by two judges who disagreed, the order was affirmed under the statute,—*held*, that the order was reviewable in the court of appeals, but only as to the question of power. *Ct. of Appeals*, 1874, *Tilton v. Beecher*, 59 *N. Y.*, 176.
51. An order of general term, reversing a special term order denying a motion on case and exceptions for a new trial, since it may have proceeded on questions of fact, can not be reversed here. *Com. of Appeals*, 1873, *Post v. Hathorn*, 54 *N. Y.*, 147.
52. An appeal direct to this court does not lie from judgment at special term rendered after further proofs taken there consequent upon a gen-

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eral term judgment. *Ct. of Appeals*, 1874, *Southworth v. Bennett*, 58 *N. Y.*, 659.

53. An order denying a motion to set aside an *ex parte* order striking out an answer, is reviewable in the court of appeals. *Ct. of Appeals*, 1874, *Rice v. Ehele*, 55 *N. Y.*, 518; reversing 65 *Barb.*, 185; *S. C.*, 46 *How. Pr.*, 153.

54. The court has power, on motion for restitution of moneys collected on a judgment, where the judgment has been reversed, and a new trial granted, to guard the respondent from loss on account of the insolvency of the appellant, by ordering the withholding and safe keeping of the moneys collected, pending the litigation. [2 *Dall.*, 205; *S. C.*, 1 *Yeates*, 160, 207; 10 *S. & R.*, 103-8; 9 *How. Pr.*, 80; 24 *Id.*, 111-118; 18 *Abb. Pr.*, 179.] *Ct. of Appeals*, 1874, *Marvin v. Brewster Iron Mining Co.*, 56 *N. Y.*, 671.

55. Such relief refused in the court of appeals, leaving it for the court below. *Ib.*

56. The following orders are not appealable to the court of appeals: Leave to amend as to parties and pleading. *Ct. of Appeals*, 1874, *Getty v. Spaulding*, 58 *N. Y.*, 636; affirming in effect 3 *Supreme Ct. (T. & C.)*, 174; mem. of *S. C.*, 1 *Hun*, 115.

An order requiring an answer to be made more definite and certain. *Ct. of Appeals*, 1874, *Innes v. Purcell*, 58 *N. Y.*, 388; affirming 1 *Hun*, 318.

Order refusing to set aside order for examination of a party (under Code, § 401) for purpose of a motion. *Ct. of Appeals*, 1874, *Rogers v. Durant*, 56 *N. Y.*, 669.

Order (in an equity action tried before court) that specified issues be tried by a jury. *Ct. of Appeals*, 1874, *Brinkley v. Brinkley*, 56 *N. Y.*, 192.

Order refusing to grant a new trial for surprise and newly discovered evidence, affirmed by the general term. *Com. of Appeals*, 1874, *Dalrymple v. Hannum*, 54 *N. Y.*, 654.

Order appointing new referee on refusal of the former one to take an account, which was discretionary with him by the order of appointment. *Mundorff v. Mundorff*, 59 *N. Y.*, 635.

Order of general term amending record to conform to actual decision. *Com. of Appeals*, 1874, *Buckingham v. Dickinson*, 54 *N. Y.*, 682.

An order denying a motion to set aside a default, and let in defense in an action for divorce, though the motion was made upon affidavits contradicting plaintiff's evidence, and on the ground that his evidence was insufficient. *Ct. of Appeals*, 1874 *Ferris v. Ferris*, 56 *N. Y.*, 614.

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An order refusing to set aside an execution, on a motion made on the ground that more than five years had elapsed before its issue. [18 N. Y., 150.] *Ct. of Appeals*, 1874, *Underwood v. Green*, 56 N. Y., 247; affirming in effect, 36 N. Y. *Superior Ct.* (4 Jones & S.), 481.

An order of the special term, affirming an order of the special term, directing restitution of property received and collected by defendant, under the judgment, which judgment was subsequently reversed on appeal. *Ct. of Appeals*, 1874, *Holloway v. Stephens*, 58 N. Y., 670.

Order determining whether a writ of assistance should be granted, or the party in possession after sale on foreclosure allowed to await an action, for it does not affect a substantial right. *Ct. of Appeals*, 1874, *Wilbor v. Danolds*, 59 N. Y., 657.

57. The objection that a defense litigated on the trial as if pleaded by all of several defendants was only pleaded by one, and therefore not available to the others, can not be first taken on appeal. *Ct. of Appeals*, 1874, *Devyr v. Schaefer*, 55 N. Y., 446.
58. Upon appeal to the court of appeals, the discretion of the court below in deciding the question whether excessive damages had been allowed at the trial, is not reviewable. *Com. of Appeals*, 1874, *Metcalf v. Baker*, 57 N. Y., 662.
59. The court of appeals will not review the finding of a jury upon questions of fact which appear from the evidence to have been controverted, upon the trial, where the controversy was actual and substantial, and not colorable merely. *Ct. of Appeals*, 1874, *Sprong v. Boston & Albany R. R. Co.*, 58 N. Y., 56; affirming 3 *Supreme Ct.* (T & C.), 54.
60. The appellant from an order granting a new trial, can not attack rulings made upon the original trial in favor of the respondent. *Com. of Appeals*, 1873, *Simpkins v. Low*, 54 N. Y., 179.
61. Upon appeal to the court of appeals from an order of the general term, denying a motion for a new trial, in a case tried by the court, where the decision does not authorize a final judgment, but directs further proceedings, questions of fact are not reviewable. *Ct. of Appeals*, 1874, *Platt v. Platt*, 58 N. Y., 646; affirming 2 *Supreme Ct.* (T. & C.), 25.
62. Where judgment for defendant is reversed, but not on the facts, and a new trial ordered, the court of appeals, on appeal from the order, will only look to the facts found, not into the evidence. *Ct. of Appeals*, 1874, *Taylor v. Guest*, 58 N. Y., 262.
63. Where no objection has been made at the trial that the proof varied from the complaint, or that the allegations of the latter were insufficient, and a decision of the controversy has been had upon the proofs, the appellate court should not reverse the judgment on the

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- ground of incompleteness or imperfection of the pleadings. [11 N. Y., 368; 20 Id., 524; 52 Id., 399.] *Ct. of Appeals*, 1874, *Tyng v. Commercial Warehouse Co.*, 58 N. Y., 308.
64. On an appeal from a judgment on the report of a referee to whom it is referred to state an account before judgment, when no answer, is interposed, exceptions to the report having been overruled, the appellate court may consider whether the facts reported are sufficient to sustain the judgment, although there is no separate appeal from the order overruling the exceptions. *Ct. of Appeals*, 1874, *Darling v. Brewster*, 55 N. Y., 667.
65. The court of appeals, upon an appeal from an order of an inferior court granting an amendment, can pass only upon the question whether the court below had power to grant the amendment, and will not consider the propriety of the amendment. *Ct. of Appeals*, 1874, *Lapham v. Rice*, 55 N. Y., 472.
66. Whether a new trial of issues determined at special term should have been granted upon the ground that the appellant or her counsel was misled by an intimation of the judge as to the state of the question presented or the disposition proper to be made of it, or whether in consequence of this, any hearing upon such issue, or of any part of it should be had, are questions addressed to the discretion of the court, and the decision thereof by the general term cannot be reviewed by the court of appeals. *Ct. of Appeals*, 1874, *Shuttleworth v. Winter*, 55 N. Y., 624.
67. Where the general term reversed a judgment and granted a new trial, and the order did not state that the reversal was upon a question of fact,—*Held*, on appeal to the court of appeals, that it must be taken to have been upon questions of law, although the opinions showed the contrary; and, no error in law appearing, that the order of the general term should be reversed. *Ct. of Appeals*, 1873, *Thorn-ton v. Autenreith*, 55 N. Y., 659; *Wallace v. Drew*, 54 Id., 678.
68. If on an appeal from an order of the general term reversing a judgment founded on a referee's report, and stating the reversal to be on questions of fact, it appears that the conclusion of the referee was not against the weight of evidence, or that it might well have been either way, or that the testimony is slight on which to found an opinion contrary to his, the fact that he saw and heard the witnesses should lead to a deference to his judgment, and a reversal of the order of the general term. *Ct. of Appeals*, 1873, *Crane v. Baudouine*, 55 N. Y., 256; reversing 65 *Barb.*, 260.
69. Rule that special weight is given to findings of the referee on facts, does not apply where the evidence is documentary. *Ct. of Appeals*, 1874, *Bigler v. Barnes*, 56 N. Y., 654.

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70. The rule that cogent proof is requisite of such a fact as mistake, does not authorize the appellate court to weigh evidence. *Ct. of Appeals*, 1873, *Van Tuyl v. West Chester Fire Ins. Co.*, 55 *N. Y.*, 657. Compare *Shuttleworth v. Winter*, *Id.*, 624.
71. If a new trial is ordered, unless plaintiff will consent to reduce the recovery, and, instead of consenting, he appeals with the usual stipulation, the court, on affirming the order, will give judgment absolute against him. [38 *N. Y.* 335.] *Com. of Appeals*, 1873, *Wilber v. Sisson*, 54 *N. Y.*, 121 ; affirming 53 *Barb.*, 258.
72. To make exceptions to a referee's report avail to reverse the judgment entered on it, it must appear by the case that there is no competent testimony to sustain the findings excepted to; that his conclusion of law necessarily depends upon such findings; and that there is no other fact presented by the evidence, and which the referee might have found, which will justify his conclusion of law and the judgment. *Ct. of Appeals*, 1874, *Caswell v. Davis*, 58 *N. Y.*, 223.
73. The general term having reversed a judgment, and also an order of a judge denying a new trial, the facts having been before them, and no error in law appearing in the reversal, judgment absolute under plaintiff's stipulation was given. *Jameson v. Brooklyn Skating Rink Association*, 54 *N. Y.*, 673.
74. In an action against trustees of a corporation, which united two causes, one for fraud, and the other for the statutory penalty or liability for filing a false report given by *Laws of 1848*, ch. 40, and amendments, it was proved that all of the defendants but one did make a false report; and the judge charged that if the jury found fraud, they should give a verdict against all the defendants, if not, then against those who signed the report only. The jury rendered a verdict against all. An error had been committed in the admission of evidence under the first count entitling the defendants to a new trial.—*Held*, that as the jury did not pass upon the question involved under the second count, the court of appeals could not, under § 330 of the Code of Procedure, order judgment for all the defendants but one, and a new trial for him, but must direct a new trial for all. *Ct. of Appeals*, 1874, *Arthur v. Griswold*, 55 *N. Y.*, 400.
75. Motion for re-argument in the commission of appeals, denied, on the ground that the remittitur had gone down, and as a new trial had been ordered, it could again come to the court of appeals. *Mechanics' & Traders' Bank of Jersey City v. Dakin*, 54 *N. Y.*, 681.

III. Appeal to the general term.

76. An order giving leave to sue on a judgment between the same

ARBITRATION.

parties, affects a substantial right, and, although involving discretion, is appealable, to the general term. *Ct. of Appeals*, 1874, *Hanover Fire Ins. Co. v. Tomlinson*, 58 *N. Y.*, 215 ; reversing 2 *Supreme Ct. [T. & C.]* 657.

77. Upon the reversal of a judgment of the special term, refusing specific performance, the general term should not, merely because the cause ought to have been retained, for the purpose of awarding damages, to the plaintiff, for breach of the contract, proceed to render final judgment for damages, the amount of which had not been passed upon below, especially where the findings of fact do not show all the sums due the plaintiff. A new trial should be awarded. *Com. of Appeals*, 1874, *Cuff v. Dorland*, 57 *N. Y.*, 560 ; reversing 55 *Barb.*, 481.
78. The court at general term can, by allowing the respondent to deduct an item erroneously recovered, cure the error in the instructions under which it was allowed. [3 *Keyes* 115 ; *Grah. & W. on N. Tr.*, 1162.] *Com. of Appeals*, 1873, *Hayden v. Florence Sewing Machine Co.*, 54 *N. Y.*, 221.
79. After judgment, order therefor on frivolous pleading not appealable. *Parker v. Warth*, 5 *Hun*, 417.
80. What is substantial right. *Security Bank of N. Y. v. Nat. Bank of the Commonwealth*, 2 *Hun*, 287.

CASE; EXCEPTIONS; MOTIONS AND ORDERS.

APPEARANCE.

1. Appearance for purpose of demurring for want of jurisdiction, does not waive the objection. *Ogdensburg, &c., R. R. Co. v. Vermont, &c., R. R. Co.*, *Ante*, 249 ; affirmed in 4 *Hun*, 712.
2. Voluntary appearance always equivalent to personal service. 8 *Eng. R. [Moak's Ed.]*, 483, 489.
3. Unauthorized appearance may be questioned collaterally. 10 *Eng. R. [Moak's Ed.]*, 492, 502.

ARBITRATION.

1. Arbitrator's decision without a hearing not binding. *Ante*, 303.
2. Where pursuant to a submission, two arbitrators, upon disagreement, "call in" a third arbitrator, the parties have a right to a rehearing upon notice. *Com. of Appeals*, 1874, *Day v. Hammond*, 57 *N. Y.*, 479.
3. The distinction between arbitrators and umpires stated. *Ib.*
4. The provision of 2 *R. S.*, 542, § 8, requiring arbitrators to take an oath as there prescribed, applies to all submissions in writing, although there be no stipulation therein for judgment. [29 *N. Y.*, 291.] *Ib.*

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5. Failure to take the oath, however, does not make the award a nullity. It is an irregularity merely. *Id.*
6. Attestation of submission. *Ocean House Corporation v. Chipper*, 5 *Hun*, 419.

ARREST.

1. Code of Pro., § 179. defining cases in which arrest is allowed, amended by adding sub. 6, "when the defendant has, without right, obtained, received, converted, or disposed of any money, funds, credits, or property, held or owned by this state, or held or owned officially, or otherwise, for or on behalf of any public or governmental interest, by any municipal or other public corporation, board officer, custodian, agency, or agent of any city, county, town, village, or other division, subdivision, department, or portion of this state. L. 1875, p. 25, c. 28.
2. Sworn complaint available as an affidavit with others to sustain order. *Palmer v. Hussey*, 59 *N. Y.*, 647, affirming 65 *Barb.*, 278.
3. All orders of arrest of any courts of record in city of New York to issue to sheriff, unless he be a necessary party. L. 1875, p. 785, c. 625.
4. Motion for discharge must be made within twenty days after the service of order. *Farmer v. Robbins*, 47 *How. Pr.*, 415.
5. Arrest for cruelty to animals. *Davis v. Society for Prevention, &c. Ante*, 73.

ASSIGNMENT.

1. A cause of action to charge corporate officers individually for corporate debt, is assignable. *Bonnell v. Wheeler*, *Ante*, 81.
2. An agreement by plaintiff in an action for damages for a personal tort, that any recovery should be received by his attorney, for his costs and counsel fees, and in satisfaction of a prior indebtedness, is valid, and although not effective to transfer the cause of action, attaches as an equitable claim to the verdict; and on recovery of the verdict, the attorney has a superior equity to it as against a judgment creditor of the plaintiff. *Ct. of Appeals*, 1873, *Zogbaum v. Parker*, 55 *N. Y.*, 120; affirming 66 *Barb.*, 341.
3. Assignment of contract passes order and acceptance connected with it. *Gallagher v. Nichols*, *Ante*, 337. Compare 57 *N. Y.*, 459.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The provisions of L. 1860, c. 348, p. 594, regulating assignments for the benefit of creditors, are by their nature restricted to assignments made by residents of this state. An assignment by a non-resident, valid by the law of his domicil, and not prohibited by any law

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- is valid as to assets here. *Com. of Appeals*, 1873, *Ockerman v. Cross*, 54 *N. Y.*, 29.
2. An assignment for the benefit of creditors, *held* to have put the assets of the assignor out of the reach of the holders of a check drawn upon him, except through the agency of a bankruptcy court. [*L.* 1860, ch. 348.] *Com. of Appeals*, 1874, *Syracuse, Binghampton & N. Y. R. R. Co. v. Collins*, 57 *N. Y.*, 641.
 3. Such assignment, properly executed, is operative from the time it is made, though the filing, giving bond, &c., be not done until afterward, if they are done within the time specified by statute. [39 *N. Y.*, 196; 45 *Barb.*, 317.] *Id.*
 4. Under the above act of *L.* 1860, c. 348, and the acts amendatory thereof, the term "county judge" includes the judge of the court of common pleas for the city and county of New York. *Ct. of Appeals*, 1874, *Matter of Morgan*, 56 *N. Y.*, 629.
 5. Failure to file approved bond within the statute time, avoids the assignment. *Hedges v. Bungay*, *Ante*, 313. Compare *Thatcher v. Bentley*, 59 *N. Y.*, 649.
 6. Assignees' bond to be filed within ten days after delivery of schedule to county judge [instead of 30 days after date of assignment]. *L.* 1875, p. 51, c. 56, amending *L.* 1860, p. 594, c. 348, § 3.
 7. Assignment is not avoided by debtors' omission or refusal to make and deliver schedule; but in such case the assignee may, within six months, make and file in the county clerk's office such schedule, and the county judge may compel delinquent debtors to disclose facts, &c. *L.* 1874, p. 824, c. 600, § 1, amending *L.* 1860, p. 594, c. 348, § 2.
 8. Under the amendment, by *L.* 1872, c. 838, § 4, the judge has no authority to refer to a referee to take and state the account of the assignee, the authority to refer being limited to the taking and reporting the evidence. *Ct. of Appeals*, 1874, *Matter of Morgan*, 56 *N. Y.*, 629. Otherwise by Act of 1875.
 9. Advertisement for claims may be authorized by the county judge. *L.* 1874, p. 824, c. 600.

ATTACHMENT.

1. Code of Pro., §§ 227, 229, defining cases in which attachment against property may be allowed, amended by adding: "or in an action against any person, natural or artificial, for without right, obtaining, receiving, converting, or disposing of any money, funds, credits, or property, held or owned by this state, or held or owned officially, or otherwise, for or on behalf of any public or governmental interest, by any municipal or other public corporation, board, officer, custodian, agency, or agent of any city, county, town, village, or other

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- division, subdivision, department, or portion of this state, or for aiding, or abetting any such payment, conversion, or disposition." *L. 1875, p. 26, c. 28.*
2. Code of Pro., § 229, as to affidavit to obtain attachment, amended, by including cases of perversion of public property, &c. *L. 1875, p. 27, c. 28.*
 3. Even before the amendment of the Code (§ 227) by 2 *L. 1866, p. 1838, c. 824, § 7*, an attachment against the property of a non-resident might, if a cause of action was shown to exist, have been issued at the time of issuing the summons, or at any time afterward [Code of Pro., §§ 227, 228, 229], and a levy might be made under it before service of the summons. The amendment was declaratory merely. [Explaining 28 *N. Y.*, 659.] *Com. of Appeals*, 1873, *Webb v. Bailey*, 54 *N. Y.*, 164.
 4. Code of Pro., § 238, allowing actions by plaintiff in an attachment, to be brought by plaintiff, in sheriff's name, upon giving security to the sheriff, amended by adding: "And if the sureties become insolvent, or said amount becomes inadequate as an indemnity, the court may, in either case, on the application of the sheriff, require the plaintiff to give him, before proceeding further, a further undertaking in an amount and with sureties to be approved by the court." *L. 1875, p. 487, c. 409.*
 5. Rights of attaching creditor, how affected by opening judgment, &c. *Phillips v. Wheeler, Ante*, 242.
 6. Sheriffs' power to discontinue actions under attachment, is controlled by the court, for protection of the parties. *O'Brien v. Merchants' Ins. Co., Ante*, 212.

ATTORNEY AND CLIENT.

1. General power over attorneys is in the supreme, not in superior city courts. *Willmont v. Meserole, Ante*, 308.
2. An attorney convicted of an infamous crime, is thereby disqualified to practice; and the fact that an alleged order disbarring him can not be found, does not avail him. *Matter of Niles*, 48 *How. Pr.*, 246.
3. Evidence to show what part of the recovery plaintiff had agreed to give his attorney, is incompetent, as immaterial. As such arrangements are lawful, a party is not discredited as a witness, by making them. Nor does an agreement to give an attorney a share of a recovery, for his services, give him such an interest as to make his admissions proper, or make him liable for costs. *Ct. of Appeals*, 1873, *Susdorf v. Schmidt*, 55 *N. Y.*, 319.
4. According to the decisions in this state [5 *Johns.* 252; 9 *Id.* 114 · 5 *Paige*, 510; 6 *Wend.* 535] an attorney issuing execution upon a

AUDIT.

- judgment, is liable to the sheriff for his fees thereon. *Ct. of Appeals*, 1874, *Campbell v. Cothran*, 56 *N. Y.*, 279; affirming 1 *Supreme Ct. (T. & C.)* 70; *S. C.*, 65 *Barb.*, 534.
5. The fact that a contract is drawn by the counsel for one party, if known to the other, does not, without fraud or unfairness, affect the contract. *Ct. of Appeals*, 1874, *Joslin v. Cowee*, 56 *N. Y.*, 626.
 6. Relation not terminated by long suspension of proceedings in action. *Bathgate v. Haskin*, 59 *N. Y.*, 533.
 7. Liability of attorney, as surety in an action. *Willmont v. Meserole*, *Ante*, 308.

ATTORNEY-GENERAL.

1. His powers; and the authority to appoint a deputy. *Bergh's Case*, *Ante*, 266.
2. The power of the attorney-general to institute an action, in the name of the sovereign power, for the enforcement of a trust by a public corporation, or by its officers, if it exists in this state, does not extend to an action of a legal nature, to recover money fraudulently obtained from a public corporation, nor to one to recover damages for such fraud, especially where the offender is not shown to have occupied any official or fiduciary relation to the public corporation. [1 *Swans.*, 265; 2 *S. & S.*, 67; 11 *Hare*, 205; 1 *Bligh*, 312; 1 *M. & C.*, 171; 1 *Cr. & Ph.*, 1; 2 *Keene*, 190; *Id.*, 513; 2 *M. & C.*, 613.] *Ct. of Appeals*, 1874, *People v. Ingersoll*, 58 *N. Y.*, 1; reversing *People v. Tweed*, 13 *Abb. Pr.*, *N. S.*, 25.
3. The wrongdoer, in such case, can only be charged as an involuntary trustee, by the owner of the money, and not by the state. *Ib.*
4. The powers of the attorney-general in England and in this state, to proceed against public corporations, for the enforcement of public trusts, stated. *Ib.*
5. To sue to recover public moneys, in certain cases. *L.* 1875, p. 45, c. 49, § 4
6. May apply costs adjudged to the people in actions prosecuted or defended by him, to expenses of office. *L.* 1874, p. 499, c. 398; *L.* 1875, p. 420, c. 373, § 1.

AUDIT.

- Necessity and effect of audit of claims against city or county of *N. Y.*
People ex rel. Martin v. Earle, *Ante*, 64.

BAIL.

BAIL.

1. Under section 186 of the Code, allowing bail to be given to discharge a defendant from arrest at any time before execution, the bail may be given at any time before execution against the person [Code of Pro., § 201], although it be after execution is issued against property. *Com. of Appeals*, 1874, *Bostwick v. Goetzel*, 57 N. Y., 582.
2. Were it, however, irregular to take the undertaking after execution issued against property, the objection can not be raised in an action upon the undertaking. [5 N. Y., 522; 32 How. Pr., 370.] *Ib.*
3. A sheriff who becomes liable as bail, for a debtor arrested (otherwise than in the special case of concealment of personal property sued for, Code, § 179, sub. 3), and whose sureties fail to justify, is entitled to the same privileges in respect to exoneration as other bail [9 How. Pr., 180, 188; 10 Abb. Pr., 256; 31 N. Y., 255; 44 Id., 162; distinguishing 48 N. Y., 143]; and may surrender on re-arresting the debtor, and be exonerated. The courts have power to grant an order, after the expiration of the twenty days, allowing this to be done. 10 Abb. Pr., 279; 1 Duer, 668.] *Ct. of Appeals*, 1874, *Brady v. Brundage*, 59 N. Y., 310; affirming in effect, 2 *Supreme Ct. (T. & C.)* 621.
4. The return of "not found" by the sheriff, to an execution against the person, subjects the bail to an action upon his undertaking, and is conclusive upon him in that action. If the return was false the bail has his right of action against the sheriff to recover as damages the amount paid upon recovery on the undertaking. [7 Wend., 352; 46 Barb., 423.] *Ct. of Appeals*, 1873, *Cozine v. Walter*, 55 N. Y., 804.
5. If, however, the bail, instead of submitting to a recovery, in the action against him, on the undertaking, and looking to the sheriff for indemnity, has surrendered his principal according to law within twenty days, after the commencement of such action, thus entitling him to an exoneration, which will constitute a perfect defense to the action, his omission to avail himself of this defense would put him in fault, and he could recover against the sheriff, not the amount of the judgment on the undertaking, but only the expense of obtaining the exoneration. *Ib.*
6. The failure of bail to complete proceedings for his exoneration on a surrender made after bail has been sued, will not wholly discharge the liability of the sheriff, incurred by a false return, but if available to the sheriff, will only go in reduction of damages in an action

BILL OF PARTICULARS.

brought against him therefor, and so can not be raised on appeal under an exception to a refusal to non-suit. *Ib.*

7. The form and manner of surrender of his principal by bail, and the mode of attesting the exoneration of bail prescribed by § 188 of the Code of Pro., are inapplicable to a surrender under § 191, after an action brought against the bail, in which case, (by § 469) the former practice established by 2 R. S., 380, §§ 21, 22, is to obtain; and the Code has only changed the limit of time. *Ib.*

BANKRUPTCY.

1. Under the present bankrupt act an attachment in a state court, though levied, and though followed by the appointment of a receiver in a state court, who has obtained possession, is wholly defeated and its lien discharged, by an assignment to an assignee in bankruptcy under proceedings commenced within four months after the attachment. *Ct. of Appeals*, 1874, *Miller v. Bowles*, 58 *N. Y.*, 253; reversing *Appleton v. Bowles*, 2 *Supreme Ct. (T. & O.)* 568.
2. An assignee in bankruptcy has not the rights of a judgment creditor, and takes subject to a lien valid against all except judgment creditors. *Ct. of Appeals*, 1873, *Cook v. Whipple*, 55 *N. Y.*, 150.
3. Proceedings in bankruptcy against the owner of an equity of redemption do not suspend a foreclosure suit already commenced in a state court; and, unless restrained by injunction from the bankruptcy court, the foreclosure suit may proceed to judgment, and a sale of the mortgaged premises will give title against an assignee in bankruptcy subsequently appointed. *Ct. of Appeals*, 1873, *Lenihan v. Hamann*, 55 *N. Y.*, 652; affirming 14 *Abb. Pr. N. S.*, 274.
4. Set-off for services rendered to the estate. *Moran v. Bogert*, *Ante*, 303.

BILL OF PARTICULARS.

1. The plaintiff may be required to furnish a bill of particulars in any action where the circumstances are such that justice demands that defendant shall be apprised of the matters for which he is to be put on trial, with greater particularity than is required by the rules of pleading [citing cases]. And this power exists in actions of crim. con. as well as others. The remedy under § 160, by motion to make the complaint more definite and certain, is not exclusive, where there is no uncertainty or indefiniteness in respect to the nature of the charge; and under § 158, the court may in all cases

BONDS.

- order a bill of particulars of the claim of either party. *Ct. of Appeals*, 1874, *Tilton v. Beecher*, 59 *N. Y.*, 176.
2. It is no answer to an application for a bill of particulars, that the defendant knows better than any one the details about which he seeks information, for this assumes the question at issue. *Ib.*
 3. Order to exclude proof must be had before trial. *Whitehall, &c., R. R. Co. v. Myers*, *Ante*, 34.

BILL OF PEACE.

A complaint can not be sustained as a bill of peace where there is neither a great number of persons interested in the questions in dispute, nor a necessity for the action to prevent multiplicity of actions, nor where relative rights, though unadjudicated, rest entirely in the legal construction of a written instrument which can readily be pronounced upon by a court of law whenever the parties appear before it with an actual controversy. *Ct. of Appeals*, 1874, *Bailey v. Briggs*, 56 *N. Y.*, 407.

BILL QUIA TIMET.

An owner in possession can not sustain an action, as in the nature of a bill *quia timet*, to settle the construction of a will under which there is an adverse claimant, on the ground that the doubt prevents his making improvements; for this is not a case of waste, nor of perishable evidence, which are the grounds of such a bill. *Ct. of Appeals*, 1874, *Bailey v. Briggs*, 56 *N. Y.*, 407.

BONDS.

1. A bond by a defendant in a creditors' suit, to satisfy any judgment to be recovered to the extent of assets which might be discovered and adjudged applicable to the creditor's original judgment, *held*, under the circumstances, to include costs of the creditor's suit. *Ct. of Appeals*, 1874, *Nichols v. Tift*, 56 *N. Y.*, 644; reversing 2 *Supreme Ct. (T. & C.)* 314.
2. Under *L. 1833, c. 78*, permission to sue on the official bond of a master in chancery is not to be granted by the supreme court as of course. If there has been a breach, the court is bound to act, but may ascertain if there was any justification therefor, or defense thereto, and if there is, or, if by reason of laches and acquiescence, injustice would otherwise be wrought, may withhold the permission. *Ct. of Appeals*, 1874, *Matter of Van Eps*, 56 *N. Y.*, 599.

CERTIORARI.

BROOKLYN CITY COURT.

1. Jurisdiction. *Hoag v. Lamont, Ante, 91.*
2. Waiver of objection to its jurisdiction. *Sanborn v. Lefferts, Ante, 42.*

CALENDAR.

Preference of causes. *L. 1875, p. 45, c. 49, § 5; Id. p. 29, c. 32.*

CARRIER

Liability of palace car company for baggage. *Welch v. Pullman Palace Car Co., Ante, 352.*

CASE.

1. Should not embody all the minutes. *Howland v. Woodruff, Ante, 411.*
2. Statement of facts in, controls findings in report. *Ct. of Appeals, 1875, Tompkins v. Lee, 59 N. Y., 662.*
3. An exception to allowing counsel to read to the jury as part of his argument, but not as evidence, parts of a book, can not be sustained if the case does not disclose what he read. *Com. of Appeals, 1874, Lyons v. Erie Railway Co., 57 N. Y., 489.*
4. On a case made for purpose of reviewing exceptions taken to a referee's findings of fact, it must be assumed that all the evidence in support of the findings excepted to, is inserted, since, if the party making the case omitted any of such evidence, the other party could, by amendment, have caused its insertion. *Ct. of Appeals, 1874, Perkins v. Hill, 56 N. Y., 87.*

APPEAL; EXCEPTIONS; REFERENCE; TRIAL.

CAUSE OF ACTION.

If plaintiff had a cause of action when commencing, the action is not necessarily to be dismissed because upon subsequently arising facts new grounds of relief are relied on. *Ct. of Appeals, 1874, Haddow v. Lundy, 59 N. Y., 320.*

NONSUIT; PLEADING; TRIAL.

CERTIORARI.

1. The rule that a tax-payer of a town, village, or city, can not maintain an action in his own name to restrain the collection of a tax

CLAIM.

- assessed upon him as a resident, or to set aside the proceedings of a municipal corporation which only affect him as they do other taxpayers, unless he has sustained some special injury [18 N. Y., 155; 23 Id., 318; 32 Barb., 410], does not preclude him from reviewing such proceedings on certiorari, on behalf of himself and all others interested [32 Barb., 131; 20 Johns., 430; 2 Cai., 179; 2 Hill, 9; Id. 14; 48 N. Y., 513]. 1873, *People ex rel. Akin v. Morgan*, 1 *Supreme Ct. (T. & C.)* 101; *S. C.*, 65 Barb., 473; approved on these points, and reversed on another ground in 55 N. Y., 587.
2. The determination of the assessors is judicial and final within the rules as to certiorari. *Ib.*
 3. The fact that a suit in equity is pending to set aside the same proceedings, is no defense to the certiorari, for a tax-payer can not have relief in such a suit. *Ib.*
 4. The town is not a necessary party to a certiorari, to set aside proceedings to bond the town on petition of a majority of the taxpayers. *Ib.*
 5. The office of a common law certiorari is, in strictness, merely to bring up the record of the proceeding of an inferior court or tribunal to enable the court of review to determine whether the former has proceeded within its jurisdiction. It is only in the absence of any other remedy, and to prevent a failure of justice, that the party will be suffered by it to bring up also the body of the case [reviewing conflicting cases]. *Ct. of Appeals*, 1874, *People ex rel. Schuylerville, &c., R. R. Co. v. Betts*, 55 N. Y., 600
 6. An arbitrary assumption by commissioners of assessment, that all the lands were equally benefitted, without considering differences of situation, is an erroneous rule of assessment, which is ground of reversal on certiorari. *Ct. of Appeals*, 1874, *People (ex rel. Parker) v. County Ct. of Jefferson*, 55 N. Y., 604; affirming 1 *Supreme Ct. (T. & C.)* 603.

CHATTEL MORTGAGE.

The delivery of a chattel mortgage to the clerk while absent from his office, and after business hours, he then and there marking it filed, does not make it effective against creditors until it is actually filed. *Com. of Appeals*, 1873, *Hathaway v. Howell*, 54 N. Y., 97.

CLAIM AND DELIVERY.

1. Proceedings to recover personal property in civil actions, unless sheriff is a necessary party, in any court of record in city of New York, to issue to sheriff only. *L.* 1875, p. 785, c. 625.

CONSTABLES.

2. Under the provisions of §§ 210, 215 of the Code, if defendant excepts to the sureties, the sheriff must, at the end of three days, deliver the property to the plaintiff, unless claimed by a third person, without waiting for the opportunity for justification. *Ot. of Appeals*, 1874, *Hofheimer v. Campbell*, 59 *N. Y.*, 269; affirming 7 *Lans.*, 157.

CLOUD ON TITLE.

1. The rule that an action to remove the lien of an assessment as a cloud on title will not lie where the defect appears on the face of the proceedings, applies equally where the defect is not in the record, but in facts which would have to be proved aliunde in order to establish or assert the lien. *Ot. of Appeals*, 1874, *Marsh v. City of Brooklyn*, 59 *N. Y.*, 280; reversing 2 *Hun*, 142; *S. C.*, 4 *Supreme Ct. (T. & C.)* 413.
2. An action by one claiming to own in fee, in his own right, under a will, and alleging a doubt in the construction of the will and consequent adverse claim of other devisees, and alleging actual possession for three years, and that the doubt constitutes a cloud on the title, and asking a construction of the will, and a judgment establishing plaintiff's title, can not be sustained. *Ot. of Appeals*, 1874, *Bailey v. Briggs*, 56 *N. Y.*, 407.

COMMISSION OF APPEALS.

Not bound by dicta of the court of appeals. *Town of Duanesburgh v. Jenkins*, 57 *N. Y.*, 177; reversing in effect 46 *Barb.*, 294.

COMMITMENTS.

1. 2 *L.* 1869, p. 1377, c. 569, § 3, allowing certain commitments in the city of New York to be addressed to the sheriff,—repealed. *L.* 1874, p. 212, c. 192, § 2.
2. Commitments of women and children (not charged with crimes punishable by death, or state's prison for more than five years, nor with second offense) and detention of witnesses, to be in a house of detention, if provided by supervisors. *L.* 1875, p. 431, c. 464.

CONTEMPT.

CONSTABLES.

L. 1866, p. 1485, c. 692, § 8, as to constable's fees (which was amended by 2 *L.* 1869, c. 820), further amended by restoring the words "going and returning," in place of the parenthesis "(going only)," which occurred twice in the first half of the section; and by add-

CONSTITUTIONAL LAW.

ing "for serving every subpoena, twenty-five cents; for every mile traveled in serving each subpoena, going and returning, five cents; for notifying a complainant, twenty-five cents; for every mile traveled in notifying a complainant, five cents, going and returning." *L. 1875, p. 312, c. 324.*

CONSTITUTIONAL LAW.

1. The constitutional provision, art. 1, § 6, of *N. Y.*, art. 14, § 1, of U. S., requiring due process of law, is waived by one who enters into a recognizance consenting to a summary remedy thereon, by judgment upon default without a trial. *Ct. of Appeals, 1874, People v. Quigg, 59 N. Y., 83.*
2. The summary proceeding for judgment on a recognizance is not a suit at common law, within the provisions of the constitution of U. S. (art. 7), and the constitution of N. Y. (art. 1, § 2), securing trial by jury; but the recognizance is an obligation of record, and at common law the trial was by the record by the court without a jury. *Ib.*
3. The proceeding of a board of excise to determine whether a license should not be revoked for violation of the law by the licensee, is not a case in which the constitution secures a trial by jury. *Ct. of Appeals, 1874, People ex rel. Presmeyer v. Commissioners of Police and Excise, 59 N. Y., 92.*
4. The right to a review in the court of appeals may be taken away by legislation. *Ct. of Appeals, 1874, People ex rel. Grissler v. Fowler, 55 N. Y., 675.*
5. The appointment of the commissioners to ascertain the compensation to be paid for private property taken for public use, authorized by art. 1, § 7, of the state constitution, must not only, in form, be made by the court, but it must be its independent untrammelled act in the exercise of its judicial responsibility; and the provisions of § 1, c. 77, of *L. 1870*, in relation to the city of Albany, requiring the court to appoint three from a list of twelve, drawn by the common council are, therefore, unconstitutional, and proceedings had thereunder are void. *Ct. of Appeals, 1874, Menges v. City of Albany, 56 N. Y., 374; affirming 47 How. Pr., 244.*
6. Commissioners selected under the terms of such act can not be regarded as a jury, and so within the constitutional provisions above. *Ib.*
7. It is competent for the legislature to take away the remedy afforded in equity for the removing of the apparent lien upon lands of void assessments. It is only when the pretended lien is sought

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to be enforced by taking his property that the owner is protected by the constitution. *Ct. of Appeals*, 1874, *Lennon v. Mayor, &c.*, of N. Y., 55 N. Y., 361.

CONTEMPT.

1. Attachment does not issue against a trustee for default of his predecessor to pay execution against his person. *Ct. of Appeals*, 1874, *Am. Life Ins. & Trust Co. v. Van Eps*, 56 N. Y., 601; reversing 14 *Abb. Pr. N. S.*, 253.
2. Contempt in communicating with grand jury. *Henry Bergh's Case*, *Ante*, 266.
3. Order and process, for less amount than required by the order disobeyed, not, therefore, defective. *O'Mahoney v. Belmont*, 48 *How. Pr.*, 29.
4. Under 2. R. S., 536, § 5, requiring an order to show cause, where no personal demand is shown, the fact that the prosecutor proceeded by motion for attachment and other relief, &c., instead of by order to show cause, is not, after appearance and full litigation of the merits, a ground of reversal. *Com. of Appeals*, 1873, *Matter of Nichols*, 54 N. Y., 62.

CONTRACTS.

1. For immoral considerations wholly void. *Steinfeld v. Levy*, *Ante*, 26.
2. Penal clause does not limit kind or amount of relief. *Noyes v. Phillips*, *Ante*, 400.
3. Failure to perform in season, not objected to, no defense. *Gallagher v. Nichols*, *Ante*, 337.

CORPORATION.

1. Can not have its own contract canceled as *ultra vires*. *Ogdensburgh & Champlain R. R. Co. v. Vermont, &c., R. R. Co.*, *Ante*, 249; affirmed in 4 *Hun*, 712.
2. Not compellable to discover books in an action between other parties. *Morgan v. Morgan*, *Ante*, 291.
3. Ratification by officers, of agreement before incorporation. *Hoag v. Lamont*, *Ante*, 91.
4. Proper remedy by stockholder against officer for abstracting funds. *Greaves v. Gouge*, *Ante*, 377.
5. Validity of subscription not affected by collateral agreement. *Whitehall, &c., R. R. Co. v. Myers*, *Ante*, 34.

COSTS.

6. Rival actions to dissolve. *McArdle v. Barney*, *Ante*, 228.
7. Corporate elections and mode of testing their validity. *Re Stranton Iron and Steel Co.*, 7 *Eng. (Moak)* 581, 585.
8. Remedy of members for wrongful expulsion. *Wood v. Wood*, 10 *Eng. R. (Moak's Ed.)* 372, 385.
9. Under §§ 432, 440 of the Code, as under the earlier provisions of the Revised Statutes [2 R. S., 584, § 45; 1 R. L., 1813, 108, § 4], the jurisdiction to try the title to corporate office is of legal, and not of equitable, cognizance. *Com. of Appeals*, 1874, *People v. Albany & Susquehanna R. R. Co.*, 57 *N. Y.*, 161; reversing in part, and affirming in part, 5 *Lans.*, 25.
10. The appointment of a receiver, as a provisional remedy in an action of a creditor against a corporation, with an injunction from the exercise of corporate powers, &c. [2 R. S., 463, § 36], is not a dissolution of the corporation; and an action meanwhile may well be brought against it by another creditor, and judgment recovered, as a condition precedent to an action to enforce the individual liability of stockholders. *Ct. of Appeals*, 1875, *Kincaid v. Dwinelle*, 59 *N. Y.*, 548; affirming 37 *N. Y. Superior Ct. (5 J. & S.)*, 326.
11. Pending an action against a corporation for specific performance, a receiver was appointed—*held*, that damages could not be awarded in lieu of performance. *Com. of Appeals*, 1874, *Stancliff v. Ross*, 57 *N. Y.*, 643.
12. The right of a person claiming to be a creditor of a corporation against which compulsory proceedings under 2 R. S., 462, have been taken, to share in the distribution of its effects in the hands of a receiver appointed under that statute, is to be determined in the action or proceeding in which the receiver was appointed; and the receiver can not be called to respond to the claim of a judgment creditor on an application, in another county, in the action in which the judgment was recovered. *Ct. of Appeals*, 1874, *Rinn v. Astor Fire Ins. Co.*, 59 *N. Y.*, 143.
13. Delay of a stockholder to enforce his remedy for an unauthorized vote of the corporation forfeiting his stock, if not prolonged to the period fixed by the statute of limitations, is no bar to an action of a legal nature therefor. *Ct. of Appeals*, 1874, *Ormsby v. Vermont Copper Mining Co.*, 56 *N. Y.*, 623; reversing 65 *Barb.*, 360.

COSTS.

1. The amendment of § 306 of the Code of Pro. by L. 1851, ch. 479, p. 899, extends to and regulates in all actions the allowance of costs to the one or more of several defendants who obtains judgment. *N. S.*—XVI.—32

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- ment in an action in which the plaintiff recovers against the other defendants. *Ct. of Appeals*, *Allis v. Wheeler*, 56 *N. Y.*, 50.
2. A defendant can not recover costs in such case where he did not interpose a separate defense by a separate answer [overruling *Zink v. Atterburg* (18 *How. Pr.*, 108) and *Decker v. Gardiner* (4 *Seld.*) 29.] *Ib.*
 3. Costs on motion for judgment on frivolous pleading. *Whitman v. Nicoll*, *Ante*, §29.
 4. Allowance may be granted on judgment for frivolous pleading. *First National Bank of Plattsburgh v. Bush*, 47 *How. Pr.*, 78.
 5. Proceedings under the general railroad act for the condemnation of lands for railroad uses, are special proceedings within § 3 of the Code of Pro. [11 *N. Y.*, 277], in which, under *L. 1854*, ch. 270, costs "may be allowed in the discretion of the court, and when allowed, shall be at the rate allowed in civil actions." *Ct. of Appeals*, 1873, *Rensselaer & Saratoga R. R. Co. v. Davis*, 55 *N. Y.*, 145.
 6. Though such a proceeding is not a trial [Code of Pro., § 252], nor an action [Id. § 1, 127], it is much more analogous to an action than a motion, so that full costs as in an action on the hearing and on appeal are properly allowed. *Ib.*
 7. Such costs, however, are to be only those granted as of right. An extra allowance can not be sustained. *Ib.*
 8. The clerk can not refuse to tax costs on a judgment on a referee's report on the ground that the report had been irregularly obtained. *Ct. of Appeals*, 1874, *Ballou v. Parsons*, 55 *N. Y.*, 673.
 9. After the refusal of an offer, followed by final judgment at general term, for a larger sum, and the reduction of such judgment to less than the offer, on appeal to the court of appeals, defendants are entitled to costs from the time of the offer as of right, except the costs in the court of appeals, which, by section 306, are discretionary where the judgment is reversed in part. *Ct. of Appeals*, 1874, *Sturgis v. Spofford*, 58 *N. Y.*, 103; reversing *Commissioners of Pilots v. Spofford*, 3 *Hun*, 57; *S. C.*, 5 *Supreme Ct. (T. & C.)* 353. Compare *Penfield v. James*, 56 *N. Y.*, 659; *Magnin v. Dinsmore*, 47 *How. Pr.*, 11.
 10. In determining whether the judgment obtained is more favorable than that offered, interest from the time of the offer during the delay caused by defendant's litigation can not be added. [47 *N. Y.*, 1.] *Com. of Appeals*, 1874, *Johnston v. Catlin*, 57 *N. Y.*, 652.
 11. The assignee of a cause of action, after suit brought, is liable for all the costs of the action, as well as those accruing before, as after, the assignment. [Citing 37 *N. Y.*, 536; 10 *Wend.*, 622; 18 *Id.*, 672; 8 *Simons*, 621; *L. R.*, 8 *Eq.*, 612, and distinguishing

COUNTER-CLAIM.

52 N. Y., 587.] *Ct. of Appeals*, 1874, *Genet v. Davenport*, 58 N. Y., 607.

- 12. A trustee can not be charged personally with the cost of a proceeding taken by his predecessor, though the present trustee would ultimately have been benefitted personally if the proceeding had been successful. *Ct. of Appeals*, 1874, *Am. Life Ins. & Trust Co. v. Van Eps*, 56 N. Y., 601; reversing 14 *Abb. Pr. N. S.*, 253.
- 13. What is sufficient evidence that a suit in the name of a receiver was brought by judgment creditors, to charge the latter with the costs. *Gallation v. Smith*, 48 *How. Pr.*, 477.
- 14. A finder of money in a car, having delivered it to the company, subsequently sued the company and had a verdict. Thereafter, the owner made demand. *Held*, that the finder was entitled to his costs on being enjoined from proceeding on the verdict. *Ct. of Appeals*, 1874, *N. Y. & Harlem R. R. Co. v. Haws*, 56 N. Y., 175; reversing 35 *Superior Ct.* (3 *Jones & S.*) 372.

COUNTER-CLAIM.

- 1. Under § 150 of the Code, there may be a valid counter-claim in favor of one only of several defendants, if the action is one in which a several judgment *may be had* between the plaintiff and the defendant who sets up the counter-claim; that is to say, if the nature of the alleged liability is such as not to preclude a separate judgment, *e. g.*, where the one making the counter-claim is principal and the other surety. The fact that a joint judgment might be given does not exclude the counter-claim. *Ct. of Appeals*, 1875, *Bathgate v. Haskin*, 59 N. Y., 533.
- 2. In an action against a surety he can not as surety merely, set up as a defense or counter-claim a cause of action in favor of his principal and against the plaintiff. [25 N. Y. 306.] It belongs to the principal, and he can elect to use it defensively, or to sue upon it, or to forego it altogether. *Ct. of Appeals*, 1874, *Lasher v. Williamson*, 55 N. Y., 619.
- 3. In an action for rent, the lessee has a right to counter-claim damages arising from a breach of the lessor's agreement to put and keep the premises in repair. *Ct. of Appeals*, 1874, *Cook v. Soule*, 56 N. Y., 420; affirming 1 *Supreme Ct.* (T. & C.) 116; S. C., 45 *How. Pr.*, 340.
- 4. In an action by an assignee of a co-partnership for a balance of account due the firm, an unliquidated claim against the firm for damages for breach of a contract by it, though existing at the time of the assignment, is not available as a set-off or counter-claim. *Com. of Appeals*, 1874, *Frick v. White*, 57 N. Y., 103.

COURTS.

5. A debtor to an estate, in the hands of a receiver, executor, or trustee, who is employed by the latter to render necessary services for the benefit and protection of the estate, may counter-claim the value of his services, in an action to recover the debt. *Ot. of Appeals*, 1874, *Davis v. Stover*, 58 *N. Y.*, 473; reversing 16 *Abb. Pr. N. S.*, 227, *note*.
6. Where the defendants set up as a counter-claim an omission of an item in their favor from an inventory connected with the contract sued upon, alleging in the answer that the omission occurred by plaintiff's fraud, and the fraud was denied in the reply—*held*, that defendants could not substantiate the counter-claim by proof of an omission not shown to be made by plaintiff's fraud, but merely without defendant's knowledge or consent. *Com. of Appeals*, 1874, *Dudley v. Scranton*, 57 *N. Y.*, 424.

COUNTY COURT.

1. Under § 30, subd. 6, of the Code, a county court has the same authority to order the sale of an infant's real-estate within the county, as the former court of chancery had; and the provisions of 2 *R. S.*, 194, §§ 170–179, regulating that court, and the general principles of equity, are to govern it in respect thereto. *Com. of Appeals*, 1874, *Brown v. Snell*, 57 *N. Y.*, 286.
2. This jurisdiction of the county court is not restricted to its appointed terms, but the court is always open to exercise it, except as limited by § 31 of the Code. *Ib.*

COUNTY JUDGE.

The power of a county judge to issue attachments is not restricted by § 228 of the Code of Procedure to cases in the supreme court triable in his county. *Com. of Appeals*, 1873, *Webb v. Bailey*, 54 *N. Y.*, 164.

COURTS.

1. The act authorizing a court of arbitration in the port of New York, *L.* 1861, p. 576, c. 251, amended by *L.* 1874, p. 336, c. 278. *L.* 1875, p. 573, c. 495.
2. By virtue of the provisions of *L.* 1873, c. 239, § 1, proceedings by mandamus are included in the jurisdiction of the *N. Y.* Common Pleas. [3 *How. Pr.*, 54; 20 *Id.*, 470.] *Ot. of Appeals*, 1874, *People, ex rel. Ryan v. Green*, 58 *N. Y.*, 295; reversing 46 *How Pr.*, 169.
3. Statutes as to courts-martial amended by *L.* 1875, p. 210, c. 223, § 50; *L.* 1874, p. 488, c. 386.

DEFENSES.

CREDITORS' SUITS.

The omission to prove the allegation that the county of execution was that where the judgment debtors resided, is not available for the first time on appeal, especially if the transaction proved to have occurred there may be regarded as raising a presumption that it was. *Com. of Appeals*, 1873, *Fox v. Moyer*, 54 *N. Y.*, 125.

CRIMINAL LAW.

An escaped prisoner can not take any action before the court. [97 *Mass.*, 545; 17 *Q. B.*, 503; 14 *Gratt.*, 677; 20 *Id.* 716; 31 *Me.* 592.] *Ct. of Appeals*, 1874, *People v. Genet*, 59 *N. Y.*, 80.

DEFAULT.

1. The provision of section 135 of the Code, fixing a time in which a defendant, except in an action for divorce, may be allowed to come in and defend, does not deprive the courts of all other power to open a default in a divorce case, where summons was served by publication. *Ct. of Appeals*, 1874, *Brown v. Brown*, 58 *N. Y.*, 609; reversing 1 *Hun*, 443; *S. C.*, 3 *Supreme Ct. (T. & C.)* 477.
2. The object of the provision was to enlarge, not to restrict, the powers of the courts; and the power which the courts had over their own judgments before the Code is not interfered with by that provision. *Id.*
3. Condition of relief from default. *Security Bank of N. Y. v. Nat. Bank of the Commonwealth*, 2 *Hun*, 287.
4. Not opened in foreclosure unless answer is presented. *Powers v. Trenor*, 3 *Hun*, 3; affirming 48 *How. Pr.*, 500.

DEFENSES.

1. Generally, a defendant has a right to set up by supplemental answer matter of defense which has occurred or come to his knowledge subsequently to the putting in of his first answer; but he must apply to the court by motion (*Code*, § 177) for leave so to do, that the opposite party may be heard, and the court may determine whether there has been inexcusable laches, or whether any of the reasons appear which are recognized as giving authority for denying the exercise of the general right in the particular instance. And the court must grant leave, unless the papers show a case in

DETERMINATION OF CONFLICTING CLAIMS.

which it may exercise its discretion to refuse [explaining 46 *N. Y.*, 200]. *Ct. of Appeals*, 1874, *Holyoke v. Adams*, 59 *N. Y.*, 233; affirming in effect 1 *Hun*, 223; 2 *Supreme Ct. (T. & C.)* 1.

2. Another action pending. An action lies upon an obligation of a third person given as collateral to the debt secured by a mechanics' lien, although simultaneously proceedings are pending against the same person to enforce the lien. *Ct. of Appeals*, 1874, *Gambling v. Haight*, 59 *N. Y.*, 354.

COUNTERCLAIM; DISCHARGE; FORMER ADJUDICATION; PLEADING;
SET-OFF.

DEPOSITION.

1. Right to take deposition to perpetuate testimony. *Cheever v. Saratoga Co. Bank*, 47 *How. Pr.*, 376.
2. Rogatory commission not issued (if at all) except on clear necessity. *Froude v. Froude*, 1 *Hun*, 76, and see appeal, Anonymous, 59 *N. Y.*, 313.
3. 2 *R. S.*, p. 394, § 14, which provides for settlement of interrogatories, amended by substituting "the county judge of the county where the action is triable," in place of the obsolete clause referring to circuit judges, supreme court commissioners, &c. *L.* 1875, p. 496, c. 420.
4. On evidence of some facts tending to show inability of the witness to attend, *held*, that the admission of the deposition was no error, although another witness was allowed to testify his opinion that the defendant was unable to attend. *Com. of Appeals*, 1874, *Johnston v. Bush*, 57 *N. Y.*, 633.
5. The rule that where a witness testifies positively to facts which *may* be within his personal knowledge, and no inquiry is made whether they were, the court assumes that they were, applies equally to testimony taken upon commission as to oral examination upon trial. *Ct. of Appeals*, 1874, *Fassin v. Hubbard*, 55 *N. Y.*, 465.
6. Testimony, otherwise competent, taken upon commission, is not rejected because not responsive to the interrogatory any more than that given upon oral examination at the trial, because not responsive to the question. The party should examine the deposition when returned, and ask for further cross-examination if necessary. *Id.*

DETERMINATION OF CONFLICTING CLAIMS.

1. When proceedings are by summons and complaint, rules applicable to actions apply. *Boylston v. Wheeler*, 2 *Hun*, 622.

DISCOVERY AND INSPECTION.

2. No one can maintain these proceedings who has not a foothold on the land, an actual entry, a possession in fact as distinguished from a possession in law or constructive possession. *Ct. of Appeals*, 1874, *Churchill v. Onderdonk*, 59 *N. Y.*, 134.
3. The action is not authorized against infant defendants. *Ct. of Appeals*, 1874, *Bailey v. Briggs*, 56 *N. Y.*, 407.
4. The only change wrought by the Code (§ 449) in proceedings to determine claims to real property, is that now they may be prosecuted by action, which must be brought in pursuance of 2 *R. S.*, § 2, subd. 4. The complaint must allege that defendants unjustly claim title to the premises in question, and must, in its prayer for judgment or otherwise, notify defendants that unless they appear and assert their claim they will be forever barred. A complaint alleging a doubtful will, and asking its construction, is not enough. *Ib.*

DISCHARGE.

Where a bankrupt asked leave to plead his discharge by supplemental answer in an attachment suit, in which the plaintiff, more than four months before the filing of the petition in bankruptcy, had received security on a discharge of the attachment—*held*, that the injustice of allowing plaintiff's advantage to be defeated was a sufficient ground for the court in its discretion to refuse leave. *Ct. of Appeals*, 1874, *Holyoke v. Adams*, 59 *N. Y.*, 233; affirming in effect 1 *Hun*, 223; 2 *Supreme Ct.* (*T. & C.*) 1. And see *Bars-tow v. Hansen*, 2 *Hun*, 333.

DISCOVERY AND INSPECTION.

1. Not allowed unless absolutely necessary. *Campbell v. Hoge*, 2 *Hun*, 308.
2. Not enforced against corporation by subpœna *duces tecum*. *Morgan v. Morgan*, *Ante*, 291.
3. Rule 20 of the supreme court, providing that orders for discovery shall declare the consequence of omission to comply, and that on proof of default the rule may be made absolute,—is unauthorized and ineffectual to enable the court to strike out a pleading without hearing the party on the question whether he has made default. The Revised Statutes (2 *R. S.* 199, §§ 19-27), by a fair interpretation, require the refusal or neglect to comply to be shown to the court upon notice, giving an opportunity to the party to ap-

 DIVORCE.

pear and litigate. *Ct. of Appeals*, 1874, *Rice v. Ehele*, 55 *N. Y.*, 518; reversing 65 *Barb.*, 185; *S. C.*, 46 *How. Pr.*, 153.

DISMISSAL OF COMPLAINT.

1. A referee has power, on failure of the plaintiff to appear at the adjourned day and complete his evidence, no evidence having been given on behalf of the defendant, to dismiss plaintiff's complaint and action. [*Code of Pro.*, §§ 238, 272.] *Com. of Appeals*, 1873, *Morange v. Meigs*, 54 *N. Y.*, 207.
2. The fact that the referee uses the phrase "for want of prosecution" does not necessarily imply that he acts under § 274 of the *Code of Procedure*, which only contemplates a neglect to proceed against one or more of several defendants. *Id.*

DISTRICT COURTS OF NEW YORK.

1. The justice is bound to approve an undertaking given on removal of a cause, if the sureties have formally justified. *O'Connor v. Moschowitz*, 48 *How. Pr.*, 451.
2. Stenographer's fees, for appeal, taxable. *L.* 1874, p. 695, c. 504.

DIVORCE.

1. Not granted for mere dissensions. Alimony and appointment of receiver, when allowed. *Davis v. Davis*, 1 *Hun*, 444.
2. An absolute divorce can not be obtained by entry of judgment on a referee's report without application to the court. *Blott v. Rider*, 47 *How. Pr.*, 90.
3. Decree of maintenance, when made, and how reviewed. *Douglas v. Douglas*, 5 *Hun*, 140.
4. In a wife's action for an absolute divorce, the court has power to award to her the custody of a child [2 *R. S.*, 148, § 59], and its discretion can not be reviewed by this court. *Ct. of Appeals*, 1873, *Price v. Price*, 55 *N. Y.*, 656.
5. The granting of a judgment of absolute divorce (as distinguished from a separation) wholly terminates the jurisdiction of the court in reference to the question of alimony, unless otherwise provided in the judgment. If no provision in respect to alimony is made, the judgment is equally final in this respect, and the court can not on a subsequent application on evidence of a change of circumstances, award alimony. It is only in respect to the care of children that the judgment may be modified. *Ct. of Appeals*,

ERROR (WRIT OF).

1874, *Kamp v. Kamp*, 59 *N. Y.*, 212; reversing 37 *N. Y. Superior Ct.* (5 *J. & S.*) 241.

DEFAULT.

DOWER.

2 *L.* 1870, p. 1720, c. 717, § 2, authorizing sale of real estate for payment of dower, amended. *L.* 1874, p. 313, c. 258.

DRAINING SWAMPS.

Power of the county court on appeal from commissioners. *People ex rel. Parker v. Jefferson County Court*, 55 *N. Y.*, 604.

EJECTMENT.

1. A claim for the rents and profits of real property, is a distinct cause of action from that upon which an action to recover the possession of real property, and for damages for withholding it, merely, is founded [Code of Pro., § 167], and under a complaint for the latter only, the former can not be recovered. [12 *Barb.*, 481.] *Com. of Appeals*, 1874, *Larned v. Hudson*, 57 *N. Y.*, 151.
2. Defenses in ejectment. *Cavalli v. Allen*, 57 *N. Y.*, 508; *Bedell v. Shaw*, 59 *Id.*, 46.

EMINENT DOMAIN.

A public body or public officers, having the right of eminent domain for public purposes, may discontinue proceedings to acquire lands, at any time before the title has actually passed. *Ct. of Appeals*, 1874, *Matter of Commissioners of Washington Park*, 56 *N. Y.*, 144; confirming 2 *Supreme Ct. (T. & C.)* 637; and reversing 15 *Abb. Pr. N. S.*, 148.

ERROR (WRIT OF).

1. A writ of error in a criminal case brings up for review only questions of law raised by exceptions properly taken at the trial. [2 *R. S.*, 740; 41 *N. Y.*, 1.] The court of appeals has no power to reverse the judgment upon the ground that the verdict was against the weight of evidence. *Ct. of Appeals*, 1874, *Donohue v. People*, 56 *N. Y.*, 208.
2. Preliminary trial of special plea not reviewed. *King v. People*, 5 *un.*, 297.

EVIDENCE.

3. Evidence consisting of acts in sight of jury not brought up by writ. *Mahoney v. People*, 3 *Hun*, 202.
4. Refusal to strike out immaterial evidence which was received without objection, and advantage from which has been disavowed, not error. *Ct. of Appeals*, 1873, *Boyce v. People*, 55 *N. Y.*, 644.
5. Legal error can not be predicated of comments of the court upon the evidence. *Id.*
6. A concession by the district attorney, of a proposition of law urged by the prisoners' counsel, without a ruling of the court or an exception, is not available on error. *Ct. of Appeals*, 1874, *Slatterly v. People*, 58 *N. Y.*, 354; affirming 3 *Supreme Ct. (T. & C.)* 669.
7. The court, being authorized by the statute to impose fine or imprisonment, or both, decided that it was bound by another statute to impose both, which it did. *Held*, that as the latter statute did not really apply, the judgment must be reversed, although lawful under the statute which was applicable. *Ct. of Appeals*, 1874, *Foote v. People*, 56 *N. Y.*, 321; reversing 2 *Supreme Ct. (T. & C.)* 216.
8. Where there was no error upon the trial except a sentence for an excessive punishment on a legal conviction, the judgment need not be reversed, but the conviction may be affirmed, and the cause remanded for proper sentence. [*L.* 1863, c. 226; 2 *R. S.*, 741, § 24; 29 *N. Y.*, 124.] *Ct. of Appeals*, 1875, *Harris v. People*, 59 *N. Y.*, 599.

EVIDENCE.

1. When it appears that a person charged with crime has the power, if innocent, to explain a fact tending to show his guilt, and fails to give such explanation, such failure may be considered as a circumstance against him. *Ct. of Appeals*, 1874, *Stover v. People*, 56 *N. Y.*, 315.
2. Failure to put in evidence an instrument marked for identification does not raise unfavorable presumption. *Conway v. Williams*, 2 *Hun*, 642.
3. Presumptive evidence of deceit in footing account. *Tolan v. Conover*, *Ante*, 210.
4. Affidavit and proof as to succession to real estate, taken before surrogate and recorded in register's office, or county clerk's office, presumptive evidence of the facts stated pursuant to the statute. *L.* 1873, p. 163, c. 552, § 2, as amended by *L.* 1854, p. 147, c. 127.
5. Notice to produce public records. *Tyng v. U. S. Submarine & Torpedo Boat Co.*, 1 *Hun*, 161.

EVIDENCE.

6. The fact that the county judge's order on appeal from a decision of the highway commissioners is directed by 1 R. S., 519, § 99, to be filed with the town clerk, and he is "to record the same," does not prevent secondary evidence of its contents on the ground that it is a record. *Com. of Appeals*, 1873, *Chapman v. Gates*, 54 N. Y., 132.
7. A party contumaciously refusing to produce his books can not object to secondary evidence of their contents; but after it has been given has not a right to give such evidence in reply. [5 Pick., 18.] *Ct. of Appeals*, 1874, *Platt v. Platt*, 58 N. Y., 646; affirming 2 *Supreme Ct. (T. & C.)* 25.
8. Secondary evidence of the contents of an instrument does not dispense with proof that the alleged lost instrument was genuine. *Ct. of Appeals*, 1874, *Nichols v. Kingdom Iron Ore Co.*, 56 N. Y., 618.
9. The witness by whom secondary evidence of an instrument is to be given, must have seen and read the writing, so as to have personal knowledge. His having heard another read it is not enough. *Id.*
10. 2 R. S. 458, § 3, as amended by L. 1864, p. 1006, c. 422, providing that in suits at law by or against domestic corporations, the incorporation need not be proved unless denied in the answer, amended by requiring such allegations to be verified. L. 1875, p. 588, c. 508.
11. The want of the clerk's signature to a judgment-roll does not render it invalid, nor prevent a certified copy from being admissible in evidence. *Ct. of Appeals*, 1873, *Goelet v. Spofford*, 55 N. Y., 647.
12. Minutes of the surrogate are not rendered incompetent by 2 R. S., 80, § 57, providing that the testimony must be entered in a book or preserved as part of the record of the office. *Ct. of Appeals*, 1874, *Haddow v. Lundy*, 59 N. Y., 320.
13. The validity of the appointment of a receiver of a national bank, held to be established by a certificate of the comptroller of the currency, approved and concurred in by the secretary of the United States treasury, and reciting the existence of all the facts required under 13 U. S. Stat. at L., 99, § 50. *Com. of Appeals*, 1874, *Platt v. Beebe*, 57 N. Y., 389.
14. An insolvent assignment, in the form of a deed by the insolvent to his assignee, expressing a pecuniary consideration, is admissible in evidence without proving the insolvency proceedings, although it recites their existence and purports to be made pursuant to a judge's order. *Com. of Appeals*, 1873, *Rockwell v. Brown*, 54 N. Y., 210; reversing 33 N. Y. *Superior Ct.* (1 *Jones & S.*) 380. S. C., 11 *Abb. Pr. N. S.*, 400; 42 *How Pr.*, 226.

EVIDENCE.

15. Under the U. S. Bankrupt act of 1867, § 4, which makes a certified copy of the assignment conclusive evidence of the assignee's title, a certified copy of the adjudication, appointment, and assignment, is sufficient to sustain the assignee's right to sue, without proof of the jurisdiction of the court. *Ct. of Appeals*, 1874, *Cone v. Purcell*, 56 *N. Y.*, 649.
16. Copy of document remaining of record in public office of foreign state or country, certified according to the form in use in such foreign state or country, and also according to §§ 1 and 2 of this act, may be read in evidence in any court of this state. Commissioner's certificate to be presumptive evidence that it has been so certified. *L.* 1875, p. 121, c. 136, § 8 and 9. Compare *Sheriff v. Smith*, 47 *How. Pr.*, 470.
17. Mode of proving bond and mortgage in foreclosure. *Knickerbocker Life Ins. Co. v. Hill*, *Ante*, 321.
18. Northampton tables competent to show the probable duration of life. *Ct. of Appeals*, 1874, *Schell v. Plumb*, 55 *N. Y.*, 592; affirming 16 *Abb. Pr. N. S.*, 19; *S. C.*, 46 *How. Pr.*, 11.
19. Instruments (other than notes, bills, and wills) duly acknowledged or proved by a subscribing witness at any time before they are offered, are admissible in evidence. *Com. of Appeals*, 1874, *Holbrook v. New Jersey Zinc Co.*, 57 *N. Y.*, 616.
20. It must appear on the face of the proceedings of commissioners of highways, in laying out highways (or by proof *aliunde*), that they acquired jurisdiction in the particular case. *Ct. of Appeals*, 1874, *Miller v. Brown*, 56 *N. Y.*, 383.
21. A record purporting to be the record of a highway laid out by them, which fails to show affirmatively that jurisdiction was acquired, can not be helped by intendment based on the fact that the commissioners were public officers acting in the discharge of a public duty, especially where the record is set up to justify an entry upon land which, in the absence of a public right of way, was clearly a trespass. *Ib.*
22. The original record of the proceedings being void, the laying out of the highway was void, and an omission to appeal from the result of the proceedings does not preclude the person interested from contesting in another action the existence of a legal highway. *Ib.*
23. In an action on an agreement to issue a policy in the form of a particular policy issued by another company, a copy of a blank form of the latter company is admissible against the objection that the particular policy as shown with the writing in it should be produced. *Ct. of Appeals*, 1873, *Van Tuyl v. Westchester Fire Ins. Co.*, 55 *N. Y.*, 657.

EXCEPTIONS (BILL OF).

24. Preliminary evidence of prisoner's examination. *Godfrey v. People*, 5 *Hun*, 369.
25. The necessity of producing a subscribing witness of a contract is not dispensed with by the fact that the pleadings of both parties allege a written instrument, and by proof that there was no other such than the one offered in evidence. *Ct. of Appeals*, 1874, *Cone v. Purcell*, 56 *N. Y.*, 649.
26. Maps made for the purpose of the trial admissible. *Curtiss v. Ayrault*, 3 *Hun*, 487.
27. The rule that entries and memoranda made by persons since deceased, in course of duty, are competent, is not restricted to entries in books, but applies equally to papers such as receipts. *Ct. of Appeals*, 1874, *Livingston v. Arnoux*, 56 *N. Y.*, 507 ; affirming 15 *Abb. Pr. N. S.*, 158.

DEPOSITIONS ; PLEADING ; WITNESS.

EXCEPTIONS (BILL OF).

1. Requisites of bill, and rights of the exceptant on settling. *Tweed v. Davis*, 1 *Hun*, 252.
2. Before what judges settled in criminal case. *Wood v. People*, 59 *N. Y.*, 117.
3. Exception of respondent not ground for reversal. *Noyes v. Phillips*, *Ante*, 400.
4. The appellant should prepare the exceptions, and should see that the points and exceptions on which he relies are correctly stated. Using the stenographers minutes in full is not proper. *Ct. of Appeals*, 1874, *Jewell v. Van Steenburgh*, 58 *N. Y.*, 85.
5. In partition, a general exception to the decree raises no question on appeal except that of jurisdiction. Error in the proceedings can only be reviewed by specific exceptions. *Ct. of Appeals*, 1874, *Howell v. Mills*, 56 *N. Y.*, 226 ; affirming 7 *Lans.*, 193 ; *S. P. Jewell v. Vansteenburg (above)*.
6. Where only two questions were submitted to the jury, and the instructions of the judge were erroneous as to both, *held*, that a general exception was sufficient to bring up both. *Com. of Appeals*, 1874, *Schenck v. Andrews*, 57 *N. Y.*, 133.
7. An exception to the report of a referee, because he finds as a legal conclusion that plaintiffs were entitled to recover of defendants the sum specified, raises the question of right to recover the entire sum. *Ct. of Appeals*, 1874, *Briggs v. Boyd*, 56 *N. Y.*, 289 ; affirming 65 *Barb.*, 197.
8. An order at circuit directing a case and exceptions to be heard in

EXECUTION.

the first instance at general term, may be vacated at special term, and permission given to move for a new trial upon a case and exceptions at special term. The power of the court over the cause is not exhausted by the order sending it to the general term. [Overruling 41 How. Pr., 137.] *Com. of Appeals*, 1873, Post *v.* Hathorn, 54 *N. Y.*, 147.

9. It is only exceptions that can be sent in the first instance to the general term. A case can not be sent there, since a motion for a new trial on a case must, in the first instance, be heard at special term, and the right to be heard before the trial judge can not be taken away. *Id.*

EXECUTION.

1. Surrogate's leave to issue execution discretionary. *Allyn v. Thurston*, 5 *Hun*, 105.
2. Executions in civil actions (except when sheriff is a necessary party), in courts of record in city of New York, to issue to sheriff only. *L.* 1875, p. 785, c. 625.
3. Even if signature by the clerk be essential to constitute a valid execution on a justice's judgment docketed in the county clerk's office, an execution not appearing on its face to be on such a judgment, and signed by attorney instead of by the clerk, is a protection to the sheriff. *Com. of Appeals*, 1873, *Hill v. Haynes*, 54 *N. Y.*, 153.
4. Section 284 of the Code, limiting the time within which an execution may issue as of course to five years, applies only to the case of omission to issue where a right to issue has continued during that time, excluding time during which a judgment has been reversed. *Ct. of Appeals*, 1874, *Underwood v. Green*, 56 *N. Y.*, 247; affirming in effect, 36 *N. Y. Superior Ct.* (4 *Jones & S.*), 481.
5. An execution does not bind chattels as against other creditors without actual levy. [Limiting 29 *N. Y.*, 489; 29 *How. Pr.*, 47.] And a levy made before the actual filing, within business hours, of the confession of the judgment on which the writ issued, is not enough. *Com. of Appeals*, 1873, *Hathaway v. Howell*, 54 *N. Y.*, 97.
6. Sheriff bound to sell various articles in parcels. *Tugwell v. Busing*, 48 *How. Pr.*, 89.
7. Levy on real estate unnecessary. *Colt v. Phoenix Ins. Co.*, 54 *N. Y.*, 595.
8. The right of a judgment-debtor, whose title has been sold on execution, to redeem from the sale, under 2 *R. S.*, 370, § 46, is

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- personal, not depending upon the condition of his title; and it continues for the period allowed by law, though he may meanwhile have parted with his title. [19 N. Y., 373.] *Ct. of Appeals*, 1874, *Livingston v. Arnoux*, 58 N. Y., 507; affirming 15 *Abb. Pr. N. S.*, 158.
9. Mode of making redemption, and its effect. *Ib.*; *Morss v. Purvis*, 2 *Hun*, 542.
10. The taking in execution of the body of a judgment-debtor is, in law, a satisfaction of the judgment, so long as the imprisonment continues, and during that time no action can be maintained by the judgment creditor against one standing as surety for the debtor, or to enforce collateral securities for the payment of the judgment [citing authorities]. *Ct. of Appeals*, 1874, *Koenig v. Steckel*, 58 N. Y., 475; affirming 36 *Superior Ct.* (4 J. & S.), 187.
11. Under the Code, the provisions of 2 R. S., 556, §§ 36, 37, are not in force; and prior to the amendment of § 288 of the Code, in 1870 (*L.* 1870, c. 741, § 11, which allows discharge in case of a month's delay to enter judgment, or three month's delay to issue execution), there was no limitation of the time during which an execution against the person of a defendant in custody might be issued. *Com. of Appeals*, 1874, *Bostwick v. Goetzel*, 57 N. Y., 582.
12. The provisions of 2 R. S. 556, §§ 36, 37, *held* to have been intended for the relief of a debtor in actual custody, and not to be applicable where he had been released upon bail, and that the debtor who had not been discharged upon *supersedeas* thereunder remains liable to arrest on execution. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. Letters may issue to one not named in will. *Hartnett v. Wandell*, *Ante*, 383.
2. It is not essential to the validity of a bond, given by an administrator with the will annexed, that his special character should be recited therein, but a bond in the general form required of administrators by 2 R. S., 77, § 42, is sufficient. *Ct. of Appeals*, 1874, *Casoni v. Jerome*, 58 N. Y., 815.
3. Surrogate may authorize compromise. *Berrien's Estate*, *Ante*, 23.
4. Reference of executor's claim against estate. *Weller v. Weller*, 4 *Hun*, 195.
5. Executor, &c., can not sue or be sued for decedent's breach of promise. *Wade v. Kalbfleisch*, *Ante*, 104.
6. In proceedings of executors or administrators, on final settlement of accounts, minors must be served with citations and special

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- guardians appointed in same manner only as on probate. *L.* 1874, p. 178, c. 156.
7. A petition to the surrogate, by a legatee, praying that the executor be ordered to appear and account, and that such further proceedings be had as might be necessary to enforce payment of the legacy, is sufficient to give jurisdiction, under 2 R. S., 116, § 18, of the subject-matter; and under an order to render a settlement, and a citation for an accounting issued thereon, the surrogate has power to examine into the account and adjust the same so far as to determine how much should be paid to the legatee. *Ct. of Appeals*, 1874, *Peck v. Sherwood*, 56 *N. Y.*, 615.
 8. Though it is better practice to object specifically to the items of an executor's account which is to be questioned, yet under a general objection the surrogate can inquire into it, and is not bound by the executor's oath and vouchers thereto. *Ib.*
 9. Upon a creditor's application for payment of debt, or on a final accounting of the executor or administrator, the surrogate has no jurisdiction to order a set-off between the creditor and the estate, if disputed [4 *Keyes*, 136], for he has not equitable powers. *Ct. of Appeals*, 1875, *Stilwell v. Carpenter*, 59 *N. Y.*, 414; reversing 1 *Supreme Ct. (T. & C.)* 615.
 10. Accounting and retainer of debt by executor. *Smith v. Christopher*, *Ante*, 332.
 11. Allowance of disbursements for making up accounts, and for counsel fee on accounting. *Brown's Accounting*, *Ante*, 457.
 12. Liability of one co-executor for funds wasted by the other. *Ib.*
 13. Executor presenting large claim, held to clear proof. *Wright's Accounting*, *Ante*, 429.
 14. A decree of a surrogate, having jurisdiction upon a final accounting, that the administrator pay plaintiffs a claim against the estate, is conclusive upon the administrator's sureties, and they can not, when sued upon the bond, contest the liability of the estate for the debt, so long as the surrogate's decree remains unreversed. *Ct. of Appeals*, 1874, *Casoni v. Jerome*, 58 *N. Y.*, 315.
 15. Executor, &c., not entitled to reopen accounting to charge payments which he had once elected to consider gifts. *Wright's Accounting*, *Ante*, 429.
 16. An executor may sue as such to set aside a surrogate's decree procured by fraud. *Ct. of Appeals*, 1875, *Stilwell v. Carpenter*, 59 *N. Y.*, 414; *S. C.*, below, 1 *Supreme Ct. (T. & C.)* 615.
 17. The supreme court, by virtue of its equity jurisdiction, has power to compel an administratrix to account to the parties entitled, especially where relief is sought of a nature which could not be ob-

FALSE IMPRISONMENT.

- tained in a surrogate's court,—*e.g.*, where the administratrix has invested trust funds in real property on which the plaintiff is entitled to a decree for a lien, and to enjoin its conveyance. *Ct. of Appeals*, 1874, *Haddow v. Lundy*, 59 *N. Y.*, 320.
18. The provisions of 2 *R. S.* 102, pt. 2, c. 6, tit. 4, as amended by *L.* 1837, p. 531, c. 460, § 40, allowing sale of real property, land contracts, &c., of a decedent, for payment of debts, amended by including funeral expenses, and making them in such proceedings a preferred debt payable before general distribution of proceeds of sale. *L.* 1874, p. 323, c. 267.
19. Limit of time to petition for sale of realty, where administrators had been removed. *Slocum v. English*, 2 *Hun*, 78.

EXTRADITION.

1. The right of a state to demand, and the obligation of a state upon which the demand is made, to surrender a fugitive from justice, rests exclusively upon the federal constitution, and the act of congress of 1793 (1 *U. S. Stat. at L.*, 302), and arises when the fugitive is charged in the regular course of judicial proceedings with a crime committed within the jurisdiction of the state demanding his surrender. The question of his guilt or innocence is immaterial. *Ct. of Appeals*, 1874, *People ex rel. Lawrence v. Brady*, 56 *N. Y.*, 182.
2. If the demand is founded upon an affidavit, no less degree of certainty is admissible than is required in an indictment for the same offense, but if any distinction exist in this respect, the affidavit should be the more full and specific of the two. *Id.*
3. The insufficiency of the affidavits, where it does not appear affirmatively that the act charged is a crime where it was committed, is to be ascertained by the common law, and this will be presumed, in the absence of such proof to the contrary, to be the same within the state making demand as in that called upon to make the surrender. *Id.*
4. The fact that an inferior magistrate in the state where the offense was committed had issued a warrant of arrest, on the proof presented by the affidavits, is not enough to give rise to a presumption that a legal crime is charged therein. *Id.*

FALSE IMPRISONMENT.

Action lies only where immediate act of imprisonment proceeded from the defendant. If defendant was guilty of bad faith in giving false opinion as to identity of accused, an action for malicious prosecution lies. *Ct. of Appeals*, 1874, *Farnam v. Feeley*, 56 *N. Y.*, 451.

FORECLOSURE.

FORECLOSURE.

1. Requisites of notice for statute foreclosure. *People ex rel. Bridenbecker v. Prescott*, 3 *Hun*, 419.
2. Proper service by mail, and proof of publication. *George v. Arthur*, 2 *Hun*, 406.
3. Ground of setting aside. *Soule v. Ludlow*, 3 *Hun*, 503.
4. In a suit for foreclosure a defendant who is liable, or whose land is, may set off or may impeach title of holder of mortgage. *Lathrop v. Godfrey*, 3 *Hun*, 739
5. The practice on proving bond and mortgage. *Knickerbocker Life Ins. Co. v. Hill*, *Ante*, 321.
6. In foreclosure the court have power in or before its final judgment to determine a controversy between the plaintiff, and a defendant claiming, as purchaser from the mortgagor, the right to remove fixtures; for this power is incident to the general power of the court to define and describe in its judgment the property to be sold. *Ct. of Appeals*, 1874, *Brown v. Keeney Settlement Cheese Ass.*, 59 *N. Y.*, 242.
7. Reference as to surplus moneys not mode of determining contested claims. *Union Dime Savings Institution v. Osley*, 4 *Hun*, 657.
8. A judgment of foreclosure and sale under a mortgage of leasehold interests may direct the payment of liens for taxes and assessments, and of rent due from the mortgagor. Rent in arrear is, in practical effect, a lien, in view of the power of dispossession by the lessor [25 *N. Y.*, 320]; and as to the taxes and assessments, in the absence of an agreement by the lessor to pay them, it is immaterial that the interests were leasehold. *Com. of Appeals*, 1874, *Catlin v. Grisler*, 57 *N. Y.*, 363.
9. Where the wife of the mortgagor did not join in the mortgage, if she is merely made a party to the action for its foreclosure, without alleging in the pleadings that the mortgage was prior or superior, or hostile to her right or interest, judgment in such action does not bar her right of dower, notwithstanding the general clause in the judgment that the defendants be foreclosed of all right in the premises, since her right was not in issue. *Ct. of Appeals*, 1873, *Merchants' Bank v. Thomson*, 55 *N. Y.*, 7.
10. Moreover, a person claiming dower by title paramount to the mortgage can not be brought into court in such suit to set up the validity of her dower [9 *N. Y.*, 502]; and if made a party, her position after judgment is the same as if she had not been made a party. *Id.*

GUARDIAN AND WARD.

11. One who assigns a mortgage as collateral security for his own debt, and after default in his debt, is made defendant in the suit to foreclose the mortgage, under the usual allegation of having some interest accrued subsequent to the mortgage, must set up his equity if he would preserve a right to redeem. If he does not, the usual judgment of foreclosure bars him, and if the premises sell to the plaintiff for less than enough to pay the debt, as collateral to which the mortgage was held, the assignor can not redeem them. It is only a prior right which is not barred by foreclosure; and the assignor, having been a party, is bound. *Ct. of Appeals*, 1874, *Bloomer v. Sturges*, 58 *N. Y.*, 168.
12. A trustee, joined in his individual capacity, is not estopped by the decree of foreclosure from maintaining ejectment against the purchaser at the foreclosure sale, based upon the trust estate in the premises. [3 *East*, 346.] *Ct. of Appeals*, 1874, *Rathbone v. Hooney* 58 *N. Y.*, 468.

FOREIGN CORPORATIONS.

1. Jurisdiction of courts of this state of actions against. *Ogdensburgh & Champlain R. R. Co. v. Vermont, &c.*, *R. R. Co.*, *Ante*, 249; affirmed in 4 *Hun*, 712; *Prouty v. Michigan, S. & N. Indiana R. R. Co.*, 1 *Hun*, 655.
2. And mode of service. *Barnett v. Chicago & Lake Huron R. R. Co.*, 4 *Hun*, 114.

FORMER ADJUDICATION.

In what cases a bar. *McArdle v. Barney*, *Ante*, 228; *Smith v. Hemstreet*, 54 *N. Y.*, 644; *McCall v. McCall*, 54 *N. Y.*, 541.

GRAND JURY.

Contempt in communicating with. *Henry Bergh's case*, *Ante*, 266.

GUARDIAN AND WARD.

1. As to power to remove, compare 2 *R. S.*, 152, § 14, as amended by *L.* 1874, p. 611, c. 469.
2. Guardianship of female infant not terminated by marriage. *Matter of Herbeck*, *Ante*, 214.

INDICTMENT.

HABEAS CORPUS.

1. The courts have jurisdiction by writ of *habeas corpus* to examine the grounds upon which the executive warrant surrendering up an alleged fugitive from justice has been issued, and, if they are insufficient, to discharge the prisoner. *Ot. of Appeals*, 1874, *People ex rel. Lawrence v. Brady*, 56 *N. Y.*, 182.
2. The adjudication on a previous writ of *habeas corpus* is no answer to a new writ, where the relator is deprived of his liberty. *Ib.*
3. Mode of issue, and return, to review commitment in oyer and terminer. *People ex rel. Phelps v. Fancher*, 2 *Hun*, 226.
4. Commitment containing erroneous item. *People ex rel. Woolf v. Jacobs*, 5 *Hun*, 428.

HIGHWAYS.

1. 1 *R. S.*, p. 514, § 60, which provides for swearing twelve reputable freeholders to certify to the necessity of—amended by making the requirement applicable in all cases of laying out and of alteration, except when done with *written consent* of landowner; and providing for the drawing of a jury, and for the proceedings in detail. *L.* 1875, p. 506, c. 431, repealing *L.* 1873, c. 315, and *L.* 1874, c. 613.
2. Where the referees on appeal wholly reverse, so that it is their duty to proceed and lay out the road, they must give new notice to the landowners. *Com. of Appeals*, 1873, *People ex rel. Odle v. Kniskern*, 54 *N. Y.*, 52; reversing 50 *Barb.*, 87.
3. Where the county judge is disqualified from appointing referees in highway proceedings, and under *L.* 1847, c. 455, a justice of the sessions should do so, the county judge has no right to designate the justice who shall act; but his order so designating is merely void, and does not invalidate the appointment made by the justice designated, if the latter is otherwise qualified to act. *Com. of Appeals*, 1874, *People ex rel. Cooke v. Commissioners of Greenburgh*, 57 *N. Y.*, 549.

INDICTMENT.

1. Proper county for indicting bigamy. *King v. People*, 5 *Hun*, 297.
2. Description of offense committed near boundary of county. *People v. Davis*, 56 *N. Y.*, 95.
3. Several means of committing an abortion may be alleged. [1 *Bish.*

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- Cr. Pro., 392, 436.] *Ct. of Appeals*, 1874, *People v. Davis*, 56 *N. Y.*, 95.
4. Requisites of indictment for forgery. *Rosekraus v. People*, 3 *Hun*, 287.
 5. For mayhem. *Godfrey v. People*, 5 *Hun*, 369.
 6. For second offense. *Gibson v. People*, 5 *Hun*, 542.
 7. The accused has not a legal right to have the sufficiency of an indictment, or of any count therein, decided upon motion to quash or set it aside, or to put the prosecution to an election (when more than one offense is charged) upon which he will proceed. The granting such relief upon motion is in the discretion of the court, and it should not be granted unless the question is free from doubt, but the party should be left to his demurrer or motion in arrest of judgment. *Ct. of Appeals*, 1874, *People v. Davis*, 56 *N. Y.*, 95.
 8. If there are several assignments of perjury, some of which are defective, and the judge refuses to withdraw those which are defective or not sustained, a general verdict is not sustainable in error, for it can not be known but that the jury convicted on defective or unsupported assignments. *Ct. of Appeals*, 1874, *Wood v. People*, 59 *N. Y.*, 117; reversing 1 *Hun*, 381; *S. C.*, 3 *Supreme Ct. (T. & C.)* 506. Compare *People v. Davis*, 56 *N. Y.*, 95.

INFANT.

1. To render an infant liable for obtaining credit by his false representation that he was of age, the action must be for damages for the fraud, not on the contract. *Com. of Appeals*, 1873, *Studwell v. Shapter*, 54 *N. Y.*, 249.
2. An accounting by a special guardian, made before the county court, at a time other than one of its appointed terms; *held* to be, if not a formal accounting, at least a settlement which made such accounting unnecessary, and to authorize an action upon the guardian's bond. *Com. of Appeals*, 1874, *Brown v. Snell*, 57 *N. Y.*, 286.
3. A special guardian of an infant, appointed to sell the infant's real-estate, cited to account, is not an opposing party, within § 31 of the Code which declares the county court always open for business in case no notice to an opposing party is required. He owes an absolute loyalty, and can not be deemed an opposing party. *Ib.*
4. This limitation upon the authority of the county court being for the benefit of the opposing party, may be waived by him, or he may estop himself from insisting upon it. *Ib.*

INJUNCTION.

1. The legal right may be established, and the equitable remedy by in-

INJUNCTION.

- junction obtained, in the same action. [40 N. Y. 191.] *Ct. of Appeals*, 1873, *Broiestedt v. South Side R. R. Co.*, 55 N. Y., 220.
2. 1 L. 1870, p. 422, c. 151, as to injunctions suspending business of corporation, amended in § 5, by excepting also savings banks. L. 1875, p. 501, c. 428.
 3. No *ex parte* injunction to be granted against American Society for Prevention of Cruelty to Animals, or its officers or agents. L. 1874, p. 12, c. 12; and see *Davis v. Society for Prevention of Cruelty*, *Ante*, 73.
 4. An injunction does not lie to restrain the legislature, either directly or indirectly, or a petition to any public body. *Ct. of Appeals*, 1874, *People v. Canal Board*, 55 N. Y., 390; affirming 1 *Supreme Ct. (T. & C.)* 309.
 5. Nor to restrain organization of village. *Stephens v. Minnerly*, 3 Hun, 566.
 6. Nor to restrain public officers from proceeding under a void statute, unless something more than apprehension that they may so proceed is shown. *Ct. of Appeals*, 1874, *People v. Canal Board*, 55 N. Y., 390; affirming 1 *Supreme Ct. (T. & C.)* 309.
 7. Nor to restrain the application of the proceeds of a tax, while in the hands of the proper official custodian after collection, on the ground that it is not authorized by law. [14 N. Y., 534; 6 Johns. Ch., 28; 25 N. Y., 312.] *Ct. of Appeals*, 1874, *Kilbourne v. St. John*, 59 N. Y., 21; affirming *Kilbourne v. Allyn*, 7 *Lans.*, 352.
 8. Nor to restrain proceedings in another suit, in the same or another court, between the same parties, where the relief sought in the latter suit may be obtained by a proper defense to the former one. *Com. of Appeals*, 1873, *Savage v. Allen*, 54. N. Y., 458.
 9. Nor at suit of one charged with an infringement of a trade-mark to restrain the commencement of threatened actions against himself and buyers from him. *Ct. of Appeals*, 1874, *Wolfe v. Burke*, 56 N. Y. 115; reversing 7 *Lans.*, 151.
 10. It is no ground for equitable interference that the decision may result in determining the law in a way which will or may have the effect of preventing suits between other parties. *Ib.*
 11. To maintain a bill of peace the diverse parties are necessary, and the fear of a suit will not sustain a bill *quia timet*. *Ib.*
 12. The bringing of a great number of suits by same plaintiff against the same defendant, all for similar penalties, in a justice's court having no power to consolidate the actions, is a proper case for a court of equity to interfere by injunction against the prosecution of all but one, until that one is determined. *Com. of Appeals*, 1873, *Third Ave. R. R. Co. v. Mayor, &c., of N. Y.*, 54 N. Y., 159.
 13. The collection of a judgment or proceeding upon a verdict will be

JOINDER OF ACTIONS.

- restrained by injunction, where it would be contrary to equity and good conscience, and the facts making it so could not have been interposed in the action in which the judgment or verdict was obtained. *Ct. of Appeals*, 1874, *N. Y. & Harlem R. R. Co. v. Haws*, 56 *N. Y.*, 175; reversing 35 *N. Y. Superior Ct.* (3 *Jones & S.*), 372.
14. The rule that the right to a temporary injunction is in the discretion of the court below, applies to an action brought for the purpose of enjoining a multiplicity of suits. *Ct. of Appeals*, 1874, *Pfohl v. Sampson*, 59 *N. Y.*, 174.
15. Defendant's damages on an undertaking given by plaintiff upon the granting of a preliminary injunction, may include counsel fees for services rendered on the motion to dissolve the injunction, and also on the reference. [11 *Paige*, 223; 1 *Barb. Ch.*, 612; 50 *N. Y.*, 282, 335; 52 *Id.*, 654.] *Ct. of Appeals*, 1874, *Rose v. Post*, 56 *N. Y.*, 603. And see *Troxell v. Haynes*, *Ante*, 1.
16. Regularity of reference to ascertain damages; and limit of amount. *Lawton v. Green*, 5 *Hun*, 157.
17. Action against sureties necessary. *Troxell v. Haynes*, *Ante*, 1.

INSANITY.

1. Belief in transmigration of souls. *Bonard's Will*, *Ante*, 128.
2. Proceedings given for the commitment of insane persons to asylums, and for the care of the estates of insane persons, and for investigations into wrongful detentions. *L.* 1874, p. 564, c. 446, amended by *L.* 1875, p. 653, c. 574.
3. Considerations controlling appointment of committee. *Matter of Owens*, 47 *How. Pr.*, 150.

INSURANCE.

1. An action to reform an insurance policy may be brought even after a loss has occurred under it. *Ct. of Appeals*, 1873, *Van Tuyl v. Westchester Fire Ins. Co.*, 55 *N. Y.*, 657.
2. Powers of life companies to make loans. *Knickerbocker Life Ins. Co. v. Hill*, *Ante*, 331.

JOINDER OF ACTIONS.

1. For libel and malicious arrest. *Watts v. Hilton*, 3 *Hun*, 606.
2. Against officers of manufacturing company. *Bonnell v. Wheeler*, *Ante*, 81; *Arthur v. Griswold*, 55 *N. Y.*, 400.
3. Section 167 of the Code, regulating the joinder of actions, applies to actions of ejectment, and precludes joining plaintiffs claiming ad-

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versely to each other against the same defendant. *Ct. of Appeals*, 1874, *Hubbell v. Lerch*, 58 *N. Y.*, 237; affirming 62 *Barb.*, 295.

4. A cause of action for the breach of a covenant for quiet enjoyment contained in a lease, and one for entering the apartments leased to the plaintiff under such lease, with false keys, breaking open his trunks, and maliciously, and feloniously removing and injuring his property, can not be joined. *Ct. of Appeals*, 1874, *Keep v. Kaufman*, 56 *N. Y.*, 332; affirming 36 *N. Y. Superior Ct.* (4 *Jones & S.*), 141.

JUDGE.

1. The provision of 2 R. S., 275, § 2, and the common law rule prohibiting a judge from sitting in a cause in which he is interested, apply only to judges *eo nomine*, or to justice's holding courts, not to an administrative officer acting in the exercise of discretion, *e.g.*, a commissioner of highways laying out a highway through lands which he owns. *Com. of Appeals*, 1874, *Foot v. Stiles*, 57 *N. Y.*, 399.
2. In case of a violation of the prohibition, the only remedy is to set the proceeding aside. The offending officer can not be treated as a trespasser. *Ib.*
3. Personal responsibility of a judge for sentencing to unauthorized punishment. *Lange v. Benedict*, 48 *How. Pr.*, 465.

JUDGMENT.

1. A judgment against a party, sued as an individual, does not bind him as a trustee, and is not an estoppel in a subsequent action, in which he sues, or is sued, in his trust capacity. [5 *Co.*, 32, 36; 13 *Johns.*, 463; 8 *Cow.*, 565; 9 *Id.*, 271.] *Ct. of Appeals*, 1874, *Rathbone v. Hooney*, 58 *N. Y.*, 463.
2. In action on individual liability of corporate officers, may be several. *Hoag v. Lamont*, *Ante*, 369
3. On penal clause of contract, not limited by penalty. *Noyes v. Phillips*, *Ante*, 400.
4. In an action on contract payable in gold, judgment should be for damages in coin, and costs in currency. *Ct. of Appeals*, 1874, *Wild v. N. Y. & Austin Silver Mining Co.*, 59 *N. Y.*, 644.
5. In an action to set aside deeds made by a trustee for his own benefit, the judgment should state a limit of time within which the plaintiff shall elect to accept the relief. *Ct. of Appeals*, 1874, *Tiffany v. Clark*, 58 *N. Y.*, 632; affirming 1 *Supreme Ct. (T. & C.)*, *Adden*. 9.

JUDGMENT.

6. In an action for the sale of property, to recover the fund which produced a part of it, it is no objection to the judgment that no direction is given as to surplus moneys. *Ct. of Appeals*, 1874, *Haddow v. Lundy*, 59 *N. Y.*, 320.
7. The filing of a confession of judgment, with judgment indorsed thereon by the clerk, in the county clerk's office, after business hours, when such office is not by law open for the transaction of business, is ineffectual, as against other creditors, to constitute a valid judgment, until the regular hour for opening the office the following day or Monday. *Com. of Appeals*, 1873, *Hathaway v. Howell*, 54 *N. Y.*, 97.
8. Amendment of judgment by filing affidavit of no answer. *Tradesmen's Nat. Bank v. McFeely*, 3 *Hun*, 699.
9. Or by allowing jurat to be signed nunc pro tunc. *Fawcett v. Vary*, 59 *N. Y.*, 597.
10. The power of sale conferred upon a collector of internal revenue by the internal revenue act of 1864 (13 *U. S. Stat. at L.*, 238, § 48), as amended by the act of 1866 (14 *U. S. Stat. at L.*, 112, § 9), is ministerial, and a sale in a case not within the statute neither divests nor confers any title. *Ct. of Appeals*, 1874, *Tracey v. Corse*, 58 *N. Y.*, 143; 5 *S. C.*, 49 *How. Pr.*, 323; affirming 45 *Id.*, 316.
11. The title to property as to which an act of forfeiture has been committed, is not divested *eo instanti* upon the commission of the offense, or upon the seizure, but only by the judgment or decree of a court having jurisdiction of the premises, and if after the seizure, possession of the property is abandoned by the government, and a decree of forfeiture not obtained, the title and right of possession is in the original owner. [2 *Wheat.*, 1; 3 *Id.*, 246; 3 *Cranch*, 350; 8 *Id.*, 398; 8 *How. (U. S.)*, 366.] *Ib.*
12. A decree which did not directly adjudicate a forfeiture, and was rendered concerning property not in the custody of the court, and not subject to its process, and where only those claiming the proceeds thereof, and not the owner, had been notified to appear, *held*, not to establish as against him the forfeiture, nor the validity of the sale under the decree. *Ib.*
13. Collection of judgment against one who stood as a surety for the judgment debtor, enjoined, where the holder of the judgment had released the sureties on an appeal bond. *Barnes v. Mott*, *Ante*, 57.
14. Arbitration pending an appeal abandons the judgment. *Baldwin v. Barrett*, 4 *Hun*, 119.
15. A judgment may be set aside on motion of another judgment creditor, on the ground that the admission of service on which it

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- was entered was ante-dated, for the purpose of giving priority. *Trolan v. Fagan*, 48 *How. Pr.*, 240.
16. In foreclosure, judgment not set aside because of unauthorized appearance. *Powers v. Trenor*, 3 *Hun*, 3 ; affirming 48 *How. Pr.*, 500.
17. *It seems* that a judgment can not be impeached in an action for the purpose, on the ground of fraud, because procured by a false suggestion of counsel, which might have been disproved by accessible evidence. *Stilwell v. Carpenter*, 59 *N. Y.*, 414.
18. The jurisdiction to set aside a judgment involves the right to give any less or minor relief,—*e. g.*, to allow a new action to be brought to review the judgment. *Com. of Appeals*, 1874, *McCall v. McCall*, 53 *N. Y.*, 541.
19. The mode of effecting the object is under the control of the court. If the mode allowed is such as could not properly be granted within its jurisdiction, the remedy is an appeal. It can not be questioned in the new proceedings allowed to be taken. *Id.*
20. Effect of vacating at instance of one party only. *Phillips v. Wheeler*, *Ante*, 242.
21. A discharged bankrupt, after two years from discharge, may apply to court of record to have its judgment against him discharged of record, on consent or on notice. *L.* 1875, p. 48, c. 52.

EVIDENCE ; FORMER ADJUDICATION.

JUDICIAL SALES.

1. Sales of real-estate in city of New York, under decree or judgment, may be made by sheriff, or by a referee appointed for that purpose, by the judgment or decree. But when any sale is made by any officer other than the sheriff, no greater fee shall be allowed than as follows :

For receiving order of sale and posting notices of sale	\$10.00
Attending sale.....	10.00
Drawing each deed.. ..	5.00
Attending and adjourning sale at plaintiff's request or order of court, but not to exceed three adjournments in one action.....	3.00
Report of sale.....	5.00
Paying over surplus moneys.....	3.00
With disbursements for printers' fees at legal rates ; fees of officers for acknowledgments and administering oaths ; and	
Auctioneer's fees actually paid not to exceed.....	12.00
for each parcel separately sold, which auctioneer's fees shall be paid by purchaser in addition to his bill.	
2 <i>L.</i> 1869, p. 1377, c. 569, as amended by <i>L.</i> 1874, p. 212, c. 192.	

JURISDICTION.

2. The rule, that where there is an outstanding inchoate right of dower in the premises, unknown to the purchaser at the time of the sale, the court will not compel him to take a deed and complete his purchase [20 N. Y., 412 ; 53 N. Y., 298], applies to judicial sales when the sale is not made at the risk of the purchaser. [1 Paige, 120 ; 7 Id., 550.] *Ct. of Appeals*, 1873, *Merchants' Bank v. Thomson*, 55 N. Y., 7.
3. The execution and delivery of a quit-claim deed from the wife to the purchaser does not obviate objection to this defect, since it is ineffectual to divest her right. [49 N. Y., 111 ; 46 Id., 571.] *Ib.*
4. But a release from the wife, executed directly to the purchaser in connection with the sheriff's deed to him, will free the premises and give him a good title thereto. *Ib.*
5. On a purchaser's motion to set aside the sale, the court may order him to complete. *Ct. of Appeals*, 1874, *Knapp v. Conger*, 59 N. Y., 635.
6. Sale not set aside because the dividing line would intersect a small building attached to a house. *Ib.*
7. Terms of vacating when purchaser knew of the defect. *Knight v. Moloney*, 4 Hun, 33.

EXECUTION.

JURISDICTION.

1. The courts of the state have jurisdiction of an action for damages, caused by the death of the plaintiff's intestate by negligence of the owners of a steamboat in the waters of the state. Although the cause of action may be a marine tort, the admiralty jurisdiction is not exclusive, and the right to pursue a concurrent remedy in the state courts is saved where there is such a remedy, either at common law or by the statutes of a state. *Ct. of Appeals*, 1873, *Dougan v. Champlain Trans. Co.*, 56 N. Y., 1 ; affirming in effect, 6 *Lans.*, 430.
2. The courts of this state have no jurisdiction of an action against a domestic railroad company for injuries by fire to realty in another state. *Huenermund v. Erie Railway Co.*, 48 *How. Pr.*, 55.
3. Jurisdiction to compel or to enjoin acts in a foreign state. 9 *Eng. R.* (Moak's Ed.), 850, 857.
4. To appoint receiver of fund here, belonging to dissolved foreign corporation. *Redmond v. Hoge*, 3 *Hun*, 171. Compare *Ogdensburgh & Champlain R. R. Co. v. Vermont, &c., R. R. Co.*, *Ante*, 249 ; affirmed in 4 *Hun*, 712.

JUSTICES' COURTS.

5. The state courts have jurisdiction of actions by assignees in bankruptcy to set aside transfers which are void only because in contravention of the bankrupt act. It is true that the act creates new rights, but these are not in the nature of a penalty ; and hence the jurisdiction does not depend on the source of the right. The remedy in the United States courts is not made exclusive of the state courts ; and the state courts can not decline the jurisdiction. *Ct. of Appeals*, 1873, *Cook v. Whipple*, 55 *N. Y.*, 150.
6. The jurisdiction of actions to enforce common law remedies for breaches of maritime contracts, or for maritime torts, by an action *in personam*, saved to the state courts by the judiciary act of Congress of 1789 (1 *U. S. Stat. at L.*, 76, § 9), is not limited, restricted, or qualified by the act of Congress of 1851 (9 *U. S. Stat. at L.*, 635, an act to limit the liability of ship owners), unless appropriate proceedings are taken under the latter statute, by a party interested to avail himself of its provisions. [13 *Wall.*, 104 ; 16 *Id.*, 522.] *Com. of Appeals*, 1874, *Baird v. Daly*, 57 *N. Y.*, 286 ; reversing 4 *Lans.*, 426.
7. The state courts have no jurisdiction of an action for an injunction and for damages, where the cause of action is founded solely upon rights created by the U. S. patent laws. [Citing 3 *N. Y.*, 9 ; 8 *Paige*, 132 ; and distinguishing 2 *Paige*, 134 ; 47 *N. Y.*, 443.] Thus they have no jurisdiction of an action founded on alleged libelous charges of infringing a patent. *Com. of Appeals*, 1874, *Hovey v. Rubber Tip Pencil Co.*, 57 *N. Y.*, 119 ; affirming 23 *N. Y. Superior Ct.* (1 *J. & S.*), 522.
8. Jurisdiction in case of joint liability, where some are without the jurisdiction. *Hoag v. Lamont*, *Ante*, 369.

JUSTICES' COURTS.

1. The provision of 2 *R. S.*, 353, § 14, as amended by *L.* 1843, c. 201, which provides that actions by the county or town officers of one county, in their official capacity, against those of another, "shall be laid" in some county adjoining that of the defendants, other than that of the plaintiffs—does not include justices' courts ; and an action therein may be brought in such case in the county where the plaintiff resides, &c. [2 *R. S.*, 225.] *Ct. of Appeals*, 1874, *Lapham v. Rice*, 55 *N. Y.*, 472 ; modifying 63 *Barb.*, 485 ; 66 *Id.*, 487.
2. *L.* 1862, amending Code of Pro., § 53, subd. 2, giving justices' courts jurisdiction of "an action for damages for injury to rights pertaining to the person," &c., includes actions for damages for

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- bodily injuries. *Ct. of Appeals*, 1874, *Coulter v. Am. Merch. Union Express Co.*, 56 *N. Y.*, 585; reversing on another point, 5 *Lans.*, 67.
3. To give a justice jurisdiction of an action commenced by attachment, the creditor is not required to furnish conclusive evidence of the facts relied on. It is sufficient if the proof had a legal tendency to make out in all its parts a case for the issuing of an attachment, even where the question of jurisdiction arises in a direct proceeding to review the adjudication. *Com. of Appeals*, 1873, *Schoonmaker v. Spencer*, 54 *N. Y.*, 366.
 4. Affidavits showing that the defendant, whose visible means were not sufficient for payment of his debts, contracted the debt on false representations, departed from his residence without notice, and remained absent without explanation, will sustain jurisdiction, although not entirely explicit as to insolvency and dishonest intent. *Id.*
 5. Requisites of affidavit for attachment. *Sickles v. Sullivan*, 5 *Hun*, 569.
 6. The provisions of 2 *R. S.*, p. 246, § 118, as amended by *L.* 1838, c. 243, which gave the right to discontinuance before issue in cases where defendant has not been arrested by warrant, if he should make affidavit showing that the justice was a necessary witness,—amended by extending it to *all* cases before issue of fact joined, and by substituting a transfer of the cause in lieu of a discontinuance. *L.* 1875, p. 323, c. 334.
 7. The provision of section 173 of the Code of Procedure authorizing amendments by the court, applies to justices' courts, and such courts have power, in an action brought by two plaintiffs, to amend by striking out the name of one, although he was named as a substantial, not a nominal party. *Ct. of Appeals*, 1874, *Lapham v. Rice*, 55 *N. Y.*, 472; *S. C.* below, 63 *Barb.*, 485; 66 *Id.*, 487.
 8. Right to amend pleadings. *Wood v. Shultis*, 4 *Hun*, 309.
 9. Requisites of execution. *Field v. Parker*, 4 *Hun*, 342.
 10. Power to punish refusing witness as for contempt. *Rutherford v. Holmes*, 5 *Hun*, 317.
 11. Insufficient notice of appeal. *Slingerland v. Bronk*, 47 *How. Pr.*, 408.
 12. No appeal from county court order denying new trial, moved for on case. *Quinn v. Weed*, 5 *Hun*, 350.
 13. It is the uniform practice of courts reviewing proceedings had before justices, to sustain them by every reasonable intendment. *Com. of Appeals*, 1873, *Schoonmaker v. Spencer*, 54 *N. Y.*, 366.

LIMITATIONS OF ACTIONS.

LACHES.

The objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position, or in the subject-matter of the action, caused by plaintiff's delay; or where the plaintiff had been ignorant of his rights, or though apprehensive of them, there was such an obscurity in the transaction, that it was difficult to gain the facts upon which to maintain the action. [2 Ball & Beat., 104; 2 Sch. & Lef., 487.] *Ot. of Appeals*, 1874, *Platt v. Platt*, 58 *N. Y.*, 646; affirming 2 *Supreme Ct. (T. & C.)*, 25.

LEASE.

In case a tenant goes beyond the powers conceded to him by the lease, in the use of the estate, the landlord may have equitable relief without waiting to the end of the lease, to see whether the premises may not be restored to their proper condition [citing the authorities]. *Com. of Appeals*, 1874, *Agate v. Lowenbein*, 57 *N. Y.*, 604; reversing 4 *Daly*, 262.

LIMITATIONS OF ACTIONS.

1. The claim of an attorney for his services to the defendant in an action, is not barred by the statute of limitations, until the statute time has passed, after his relation as attorney in the suit has terminated. A delay of ten years, by plaintiff's failure to prosecute, does not set the statute running. *Ot. of Appeals*, 1875, *Bathgate v. Haskin*, 59 *N. Y.*, 533.
2. A cause of action for a tort,—*e. g.*, fraudulent representations inducing a purchase,—is deemed to have accrued at the time when the original wrong was committed, and the statute begins to run from that time, not from the time when damage subsequently accrued. If the original wrong gave a right even to nominal damages, the fact that substantial damages accrued much later does not take the case out of the statute. [Reviewing cases.] *Com. of Appeals*, 1874, *Northrop v. Hill*, 57 *N. Y.*, 351; affirming 61 *Barb.*, 186.
3. Action by people of state to recover public moneys diverted, to be brought within ten years, absence of defendant not included. *L.* 1875, p. 43, c. 49, § 1, last clause.

MANDAMUS.

4. The right of enjoying an easement in the bringing of water across the land of another, is a continuous one; and unlawfully preventing its exercise even by parol assent of the owner, is a continuous injury not barred by the statute of limitations. *Ct. of Appeals*, 1873, *Arnold v. Hudson River R. R. Co.*, 55 *N. Y.*, 661; reversing 49 *Barb.*, 108.
5. Since the statute of limitations acts only upon the remedy, it does not afford a presumption of payment upon which to base an action for affirmative relief, nor will a judgment even founded in part—*i.e.*, as to some installments—upon the statute interposed as a defense, sustain such an action. [*N. Y.* (4 *Kern.*), 302; *Id.*, 477.] *Com. of Appeals*, 1873, *Johnson v. Albany, &c., R. R. Co.*, 54 *N. Y.*, 416; affirming 5 *Lans.*, 222, and reversing 40 *How. Pr.*, 193.
6. Limitation of suit for specific performance. *McCotter v. Lawrence*, 4 *Hun*, 107.
7. As against a claim on a lunatic, deceased. *Sanford v. Sanford*, 2 *Hun*, 94.
8. Of action on new promise after attaining majority. *Halsey v. Reid*, 4 *Hun*, 777.
9. Limitations not evaded by bringing in party by amendment. *Merritt v. Scott*, 3 *Hun*, 657.
10. Entry of order to refer claim against executor, &c., equivalent to commencement of action. *Hultslander v. Thompson*, 5 *Hun*, 348.

MANDAMUS.

1. The remedy by mandamus exists, in general, only where the law affords no other, in order to prevent a failure of justice. Where plaintiff makes out his right to an action at law, it can never be necessary to resort to a mandamus, even where that remedy is legally available; certainly not where it would be ineffectual. *Com. of Appeals*, 1874, *Clark v. Miller*, 54 *N. Y.*, 528; affirming 47 *Barb.*, 38.
2. Mandamus to compel payment of salary is not the proper remedy on which to determine the title to a public office in a doubtful case, where the relator is out of possession, and defendant is in possession, and the construction of the law not clear. *Ct. of Appeals*, 1873, *People ex rel. Dolan v. Lane*, 55 *N. Y.*, 217. (A *mem.* of the decision below will be found in 8 *Alb. L. J.*, 349.)
3. The remedy of an officer in the city (as distinguished from the county) of New York, for a payment of his salary, is by action, and not by mandamus; although remedy by action against a public officer for a neglect to perform his duty is not such a remedy by action as will prevent the allowance of a mandamus. [46 *N.*

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- Y., 9.] *Ct. of Appeals*, 1874, *People ex rel. Ryan v. Green*, 58 N. Y., 295; reversing 46 *How. Pr.*, 169.
4. Not awarded against municipal corporation on disputed claim without jury trial. *People ex rel. Tenth Nat. Bank v. Board of Apportionment*, 3 *Hun*, 11.
 5. A town collector can be compelled by mandamus to pay over moneys, he has collected under a special act, to the officer designated in the warrant pursuant to that act [23 *Wend.*, 459; 24 N. Y., 114]; and it is no ground for refusing the writ, that he has, by voluntarily paying them to another officer than the one so designated, subjected himself to loss, or made it difficult to obey the writ. [4 *Hill*, 630.] *Ct. of Appeals*, 1873, *People ex rel. Martin v. Brown*, 55 N. Y., 180.
 6. A mandamus should not be granted to compel officers who have not complied with the law, to make oath, prescribed by the law, that they have done so—*e. g.*, to compel tax assessors to add to their verification of the roll, as prescribed by *L. of 1851*, Ch. 176, § 8,—that they estimated the value of the real-estate at its full value, when, in fact, they appraised it at a fraction thereof. [43 N. Y., 457.] *Ct. of Appeals*, 1873, *People ex rel. Supervisors of Westchester v. Fowler*, 55 N. Y., 252.
 7. When may lie, though there be action. *People ex rel. N. Y. & Harlem R. R. Co. v. Havemeyer*, *Ante*, 219.
 8. Every citizen of a county has an interest in securing the promulgation, according to law, of the statutes, by publication in the newspapers of the county; and no private or peculiar interest is necessary to enable a citizen to be a relator in a mandamus to compel the supervisors to designate the papers. [19 *Wend.*, 56; 37 N. Y., 344.] *Ct. of Appeals*, 1874, *People ex rel. Waller v. Board of Supervisors of Sullivan Co.*, 56 N. Y., 249.
 9. Seal necessary. *People ex rel. Clapp v. Fisk*, 1 *Hun*, 464.
 10. To an alternative writ to compel compliance with a statute requiring defendants to designate two papers of opposite politics, and fairly representing the two principal parties,—an allegation that certain papers were duly designated, is not sufficient, for it is a conclusion of law instead of a statement of the requisite facts. *Ct. of Appeals*, 1874, *People ex rel. Waller v. Supervisors of Sullivan Co.*, 56 N. Y., 249.
 11. An equivocal return, or one pleading a statute, but substantially departing from the requirement of the statute, is not enough. *Ib.*
 12. After return to an alternative writ, the cause is heard on those papers, and without referring to the affidavits on which the writ was granted. [10 *Wend.*, 25.] *Ib.*

MANDAMUS.

13. A want of averments in the alternative writ showing a title in the relator to the relief sought, or the fact that he has a remedy by action, may be taken advantage of at any time before a peremptory writ is awarded. [10 Wend., 26.] *Ct. of Appeals*, 1874, *People ex rel. Ryan v. Green*, 58 N. Y., 295; reversing 46 *How. Pr.*, 169.
14. Where the peremptory writ of mandamus is in substance like the alternative writ, both commanding the doing of the same act, but merely differing in some immaterial matter of detail as to the method of doing it, and where the act is one the defendant is under legal obligation to do, and the variance is to his ease, and not to his distress, the peremptory writ will not be set aside for variance [reviewing the authorities]. *Ct. of Appeals*, 1874, *People ex rel. Green v. Dutchess & Columbia R. R. Co.*, 58 N. Y., 152.
15. While, under the General Railroad act (*L.* of 1850, ch. 140, § 28, subd. 5), a railroad company has discretion as to the manner of restoring a highway, across or along which the railroad has been constructed, the discretion is a ministerial one; the restoration must be accomplished, and if the company's choice of modes prove ineffectual, the court should, in the mandamus, point out in what it has failed, and direct it particularly what to do, [following 45 N. Y., 196; 51 *Id.* 408; and reviewing the authorities to the contrary]. *Id.*
16. As railroad companies have power, incidental to their obligation to restore a highway, to take lands if a removal or change of the highway be necessary, the writ directing restoration is not, on the ground that such taking will be essential, open to the objection that it commands an unlawful, impossible, or unauthorized act. *Id.*
17. *It seems* that if, in proceeding to take lands, defendant should be defeated on the merits, this would be a good answer to proceedings for contempt in not carrying out the directions of the writ. *Id.*
18. A direction by the court, by mandamus, that the track of the highway be changed for a short distance, from one side of the railroad to the other, to avoid the necessity for, and danger of, two crossings—*held*, to be within the power of the court, and not to assume to discontinue the highway. *Id.*
19. An order of a justice at special term, disregarding some findings of fact of a referee, on the return of a mandamus, where the report contained the evidence, and both parties had appeared, and were heard before the justice on the report and on the evidence, and attended the justice in viewing the premises concerned, without objection,—sustained. *Id.*
20. Where the alternative writ, or the rule absolute, has been for the doing of something, to command which there was no power given

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by the statute on which the proceedings were based, the question not being of a variation in the detail, or of the exercise of the discretion of the court as to means, but of whether there was the power or not to command the doing of the substantial act, the court will not award a peremptory mandamus commanding the doing of substantially a different thing. *Ib.*

21. An order awarding a peremptory writ, made on argument had upon the return of defendants to the alternative writ, is not irregular or without authority ; and after the merits have been argued and decided on the return, defendants can not for the first time give notice of filing the return, and require a demurrer or plea. Rule 55, which provides that, if plea or demurrer is not interposed to the return, the writ may be brought on for hearing at a subsequent term, is merely intended to enable defendants to compel a hearing ; and if the parties assent, the right to demurrer or plea may be waived, and the cause heard at once. *Ot. of Appeals*, 1874, People *ex rel.* Waller *v.* Board of Supervisors of Sullivan, 56 N. Y., 249.

MANUFACTURING COMPANIES.

1. Individual liability notwithstanding voluntary dissolution. Sanborn *v.* Lefferts, *Ante*, 42.
2. Stockholder not liable may, as creditor, sue trustee. *Ib.*

MARINE COURT.

1. Act of 1875. Jurisdiction in respect of amount, extended to two thousand dollars, and further defined, and the procedure in the court regulated. L. 1875, p. 543, c. 479.
2. Procedure in, regulated ; and removal of cases from other courts, &c. L. 1874, p. 731 c. 545. But see Alexander *v.* Bennett, 60 N. Y., 204 ; De Hart *v.* Hatch, 3 Hun, 375.
3. Process, by what officer to be executed. Matter of Lippman, 48 How. Pr., 359.
4. Effect of undertaking, where appeal is dismissed. Wheeler *v.* McCabe, 47 How. Pr., 283.

MARRIAGE.

During absence of husband or wife. Spicer *v.* Spicer, *Ante*, 112.

MECHANICS' LIEN.

1. Persons performing labor, and material-men, in the construction,

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- alteration, or repair of any building, vault, wharf, fence, or other structure in the city of New York; and persons who at owner's request grade, fill in, or otherwise improve a lot, or the sidewalk, or street, in front or adjoining, may have a lien, to be secured and foreclosed as herein prescribed. *L.* 1875, p. 436, c. 379.
2. The general act for all the counties except Erie, Kings, Queens, New York, Onondaga, and Rensselaer (*L.* 1873, p. 743, c. 489), extended to the county of Erie, exclusive of Buffalo. *L.* 1874, p. 743, c. 551.
 3. Proceedings to impose and enforce mechanics' liens, rest entirely upon statute; and the court can not supply supposed defects. *Com. of Appeals*, 1873, *Benton v. Wickwire*, 54 *N. Y.*, 226.
 4. Under the mechanics' lien law for the city of New York (*L.* 1863, p. 859, ch. 500, § 6) no lien can be created on the interest of any one, as owner of the premises, unless he or his agent entered into a contract express or implied for doing the work [45 *N. Y.*, 207]. Thus a lien can not be had against a lessor whose lessee contracted for the work, although the lessor, without consenting to the work being done, supervised the mode of doing it. *Com. of Appeals*, 1873, *Muldoon v. Pitt*, 54 *N. Y.*, 269; affirming 4 *Daly*, 105.
 5. Construction and effect of N. Y. City Act of 1863, as to who is owner, as to amendment, personal judgment, and time of filing the lien. *McGraw v. Godfrey*, *Ante*, 358.
 6. Construction and effect of the Buffalo and other cities act of 1844. *Welcome v. Jones*, *Ante*, 358, *n.*
 7. The principle (which is recognized even without an express provision in the statute) that the owner is protected against a lien, when he has paid the contractor in full pursuant to the contract, is equally applicable to protect the contractor, who in like manner has paid his sub-contractor, against a lien filed by a servant of the sub-contractor. The amendment by *L.* 1866, c. 788, to the Onondaga County act (*L.* 1864, c. 366), which is declaratory of this principle in respect to the owner, does not exclude its application in respect to a contractor. *Ct. of Appeals*, 1874, *Lumbard v. Syracuse, Birmingham & N. Y. R. R. Co.*, 55 *N. Y.*, 491; reversing 64 *Barb.*, 609.
 8. The N. Y. City act of 1863 left in force the former act as to liens existing at the date of its enactment, but repealed it as to liens created thereafter. *Com. of Appeals*, 1874, *Fitzpatrick v. Boylan*, 57 *N. Y.*, 433.
 9. The filing of a notice of lien which had ceased to be operative for want of enforcement, under the N. Y. City act of 1851, was no bar to the enforcement of one subsequently filed, and in no manner affected it. *Com. of Appeals*, 1874, *Hallahan v. Herbert*, 57 *N. Y.*, 409; affirming 4 *Daly*, 209; 11 *Abb. Pr.*, *N. S.*, 326.
 10. A proceeding to foreclose a mechanics' lien under the N. Y. City

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- act of 1851 (*L.* 1851, c. 513, as amended by *L.* 1855, c. 404) was not an action within § 2 of the Code, but a special proceeding, so that § 111 of the Code—that every action must be prosecuted by the real party in interest—did not apply, and an assignee of the lienor could sue in the name of the latter. *Ib.*
11. A personal judgment against a party personally liable was proper in such proceeding. *Ib.*
 12. Joining party not named in notice. *Brown v. Welch*, 5 *Hun*, 582.
 13. The power to amend pleadings under the N. Y. City act (*L.* 1863, c. 500, § 5), is the same as under the Code. *Ct. of Appeals*, 1874, *Gambling v. Haight*, 58 *N. Y.*, 623; affirming in effect, 14 *Abb. Pr.*, *N. S.*, 398, *n.*
 14. Foreclosure of a mechanic's lien (under the N. Y. City law of 1863, c. 500, p. 859) being an equitable proceeding, final judgment may be given, on appeal, even contrary to the finding of the jury, if the appellate court are satisfied that such judgment will not work injustice. *Com. of Appeals*, 1873, *Muldoon v. Pitt*, 54 *N. Y.*, 269; affirming 4 *Daly*, 105.
 5. By the amendment to the general act of 1854, by *L.* 1871, ch. 188, extending the lien in cases where proceedings should be taken to foreclose, to one year after judgment, *it seems* that judgment for the claimant is intended. *Com. of Appeals*, 1873, *Benton v. Wickwire*, 54 *N. Y.*, 226.
 16. Under the N. Y. City Act, *L.* 1863, p. 850, c. 500, the court can not award specific performance of a contract to pay by the conveyance of property, for no such power is given by the statute. In such a case the court may determine in money the amount that was to be so paid, and proceed for that sum. *Ct. of Appeals*, 1874, *Dowdney v. McCullom*, 59 *N. Y.*, 367.
 17. But if plaintiff shows neither demand nor defendant's inability, he is not entitled to recover that which should have been paid by the conveyance, and the fact that defendant gave him notice to foreclose the lien makes no difference. *Ib.*

MOTIONS AND ORDERS.

1. Motion to set aside judgment, is a proceeding in an action. *Pitkin v. Cooley*, 5 *Hun*, 48.
2. Place of moving in several actions in different counties. *Phillips v. Wheeler*, *Ante*, 242.
3. Motion in one suit to vacate receivership in another. *Wilson v. Barney*, 5 *Hun*, 257.

NEW TRIAL.

4. The rule that a party can not indirectly appeal from one judge to another of co-ordinate jurisdiction by motion for relief from an order or judgment against him, but must appeal to a higher court, does not apply when the court having made the order or judgment was entirely without jurisdiction, and the proceeding void; for one is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times; hence, may move before another judge to have it vacated. *Ct. of Appeals*, 1874, *Kamp v. Kamp*, 59 *N. Y.*, 212, reversing 37 *N. Y. Superior Ct.* (5 *J. & S.*) 241.
5. Leave to renew, when necessary. *Bank of Havana v. Moore*, 5 *Hun*, 624.
6. Deposition of a witness, how and in what cases compelled. *Dauchy v. Miller*, *Ante*, 100.
7. Reference not ordered to take affidavit for ex parte motion. *De Hart v. Hatch*, 1 *Hun*, 238.
8. Reference to take affidavit and proceedings thereon. *McCue v. Tribune Association*, 1 *Hun*, 469.
9. Party can not be compelled to make affidavit for a motion. *Spratt v. Huntington*, 2 *Hun*, 341; *Knoeppel v. King's Co. Fire Ins. Co.*, 47 *How. Pr.*, 412.
10. If affidavits on a motion are conflicting, party is left to action. *Ct. of Appeals*, 1874, *Hill v. Hermans*, 59 *N. Y.*, 396.
11. Proper order on revival, after testimony taken. *Bond v. Smith*, 4 *Hun*, 48.
12. An order irregularly granted, or without jurisdiction, may be set aside on motion by any judge having power to act, as well as by the judge who granted it. [18 *Wall.*, 163; 53 *N. Y.*, 476.] *Ct. of Appeals*, 1874, *Kamp v. Kamp*, 59 *N. Y.*, 212; reversing 37 *N. Y. Superior Ct.* (5 *J. & S.*) 241.
13. Appeal does not lie from order striking out pleading as frivolous, without judgment. *Whitman v. Nicoll*, *Ante*, 329.

NATIONAL BANKS.

May be sued notwithstanding appointment of receiver. *Security Bank of N. Y. v. Nat. Bank of the Commonwealth*, 2 *Hun*, 287.

NEW TRIAL.

1. The rule that when a fact is conclusively proved by competent evidence, so that the court can see that no prejudice or injury could possibly have resulted from the admission of incompetent evidence

NEW TRIAL.

- to prove the same fact, its admission will not be cause for interfering with the result or reversing a judgment, is to be cautiously applied, especially in criminal cases. [18 N. Y., 546; 14 W. R., 111; 19 N. Y., 299.] The true rule, and the only rule that can be sustained upon principle, is this: The intendment of the law is, that an error in the admission of evidence is prejudicial to the party objecting, and will be ground for the reversal of the judgment unless the intendment is clearly repelled by record. The error must be shown conclusively to be innoxious. [36 N. Y., 639; 35 Id., 49.] It is not enough that the court sitting in review of the judgment may be of the opinion that the result ought to, and probably would, have been the same if the objectionable evidence had been excluded; and especially ought not such a presumption avail to cure an error upon a criminal trial. *Ct. of Appeals*, 1874, *Coleman v. People*, 58 N. Y., 555; affirming 1 *Hun*, 596; S. C., 4 *Supreme Ct.*, (T. & C.) 61.
2. On the question of contributory negligence of a child of twelve, when separated from his parent,—*held*, that the admission of evidence of his parent's previous cautions could not have prejudiced, and was not ground for reversal. *Downs v. N. Y. Central R. R. Co.*, 56 N. Y., 664.
 3. The admission, without objection, of evidence pertinent to the issues in the action, but which also presents an issue not within the pleadings, is not a waiver of objection to considering such issues. [19 N. Y., 37.] *Com. of Appeals*, 1874, *Williams v. Mechanics' & Traders' Ins. Co.*, 54 N. Y., 577.
 4. Upon the denial of a motion for a nonsuit, a good ground of denial must appear, but need not be specified. *Ib.*
 5. A verdict can not be impeached by the affidavit of a juror that he was deaf. *N. Y. Com. Pl., Sp. T.*, 1875, *Messenger v. Fourth Nat. Bank*, 48 *How. Pr.*, 542.
 6. The rule that, when a verdict is special, and does not find all the facts essential, or pass on all material issues, a new trial will be ordered, does not apply where a cause comes before the court on appeal from a judgment at special term, rendered on a trial by the court alone, after specific questions had been framed and submitted to a jury under § 254 of the Code. *Ct. of Appeals*, 1874, *Jackson v. Andrews*, 59 N. Y., 244.
 7. The fact that on such an appeal the case does not contain the evidence given before the jury, leads to a presumption that the verdict was correct. *Ib.*
 8. Should be moved for, after interlocutory decision and before reference. *Church v. Kidd*, 3 *Hun*, 254.

NEW YORK (CITY OF).

9. New trial in equity cause, in analogy to ejectment. *Banker v. Banker*, 4 *Hun*, 259.
10. For excessive damages against corporation. *Peck v. N. Y. Central & Hudson River R. R. Co.*, 4 *Hun*, 236.
11. Mode of obtaining, for inadequate damages. *Carpenter v. Beare*, 4 *Hun*, 509.
12. Requisites of affidavit, on ground of newly-discovered evidence. *People ex rel. Stemmler v. McGuire*, 2 *Hun*, 269.
13. May be ordered unless party consented to deduction. *Moran v. Bogert*, *Ante*, 303.
14. Where a new trial is asked as a matter of favor, or rests in the discretion of the court, a condition—as that the action shall not abate in case of the death of the party desiring it—may be imposed upon granting it. *Com. of Appeals*, 1873, *Anderson v. Rome, &c.*, R. R. Co, 54 *N. Y.*, 384.
15. But where the party asks it as of right, as because of some legal error at the trial—the court has no discretion, and finding errors, is bound to grant it without condition. *Id.*

NEW YORK (CITY OF).

1. Mode of enforcing payment of county claims. *People v. Earle*, *Ante*, 64.
2. *L.* 1858, p. 574, c. 388, § 1 & 2,—allowing assessments in New York to be vacated for “fraud or legal irregularity,” amended by allowing it only for fraud or “substantial error,” and the remedy by action to vacate such assessments abolished. *L.* 1874, p. 366, c. 312. See also *L.* 1872, p. 1416, c. 580, § 7, amended by *L.* 1874, p. 366, c. 313.
3. 2 *L.* 1872, p. 1416, § 7,—prohibiting the setting aside of assessments for any other cause than fraud, or repeated paving, amended by making it applicable to work hereafter done. *L.* 1874, p. 366, c. 313.
4. The provisions of § 7, ch. 580, *L.* 1872, forbidding assessments in N. Y. City to be set aside for certain defects, are not confined to statutory proceedings, but prohibit suits in equity. *Ct. of Appeals*, 1874, *Lennon v. Mayor, &c.*, of N. Y., 55 *N. Y.*, 361.
5. If the provisions of *L.* 1872, c. 580, § 7, should be held to validate assessments made prior to its passage, and which were void when made because of one of the irregularities specified in the act, it can only render them effectual from the passage of the act, so that sales prior to that date would be void. *Id.*
6. Application to vacate assessments referable. *Matter of Bohm*, 4 *Hun*, 558.

NOTICE.

NON-SUIT.

1. Rule as to when non-suit or direction of a verdict is proper. *Wombough v. Cooper*, 2 *Hun*, 428.
2. Non-suit of joint plaintiffs where there should be separate recovery. *Fuller v. Fuller*, 5 *Hun*, 595.

NOTARY PUBLIC.

Any notary public* for Kings, Queens, Richmond, Westchester, Putnam, Suffolk and Rockland, or city of New York, on filing * certified copy of appointment and autograph, with clerk of any other of said counties, may act in such other county.* County clerk may give certificate. *L.* 1875, p. 527, c. 458, amending p. 94, c. 105; *L.* 1873, p. 1211, c. 807.

NOTICE.

1. The theory of the doctrine of *lis pendens*, administered by courts of equity, is the public policy that while a suit is pending there is to be no change in the existing state of things; and when a decree is rendered, the existence of the suit is no longer notice. [1 *De Gex & J.*, 566; 2 *Rand.*, 93; 3 *Atk.*, 392.] *Com. of Appeals*, 1874, *Holbrook v. New Jersey Zinc Co.*, 57 *N. Y.*, 616.
2. The doctrine of *lis pendens* is not applicable to affect the title to stocks and other such commercial and negotiable paper. [48 *N. Y.*, 585.] It is a harsh rule, and chiefly, if not wholly, applicable to real property. *Ib.*
3. The pendency of a foreign action is no notice. The doctrine of *lis pendens* has no extra territorial application. *Ib.*
4. Where the proceedings are *in rem.*, the custody of the *res* may be constructive notice to the parties in interest; but if the court have not such custody, and the owner has no notice of the proceedings, they are void. *Ct. of Appeals*, 1874, *Tracey v. Corse*, 58 *N. Y.*, 143; *S. C.*, 49 *How. Pr.*, 323; affirming 45 *How. Pr.*, 316.
5. The question as to who was entitled to the proceeds of the property, is one with which the owner had no concern, if, as he claimed, the sale was void, and he was not called upon to defend his title under a proceeding to determine the right to the proceeds. [3 *Sumn.*, 607; 4 *McLean*, 267; 20 *N.* 65.] *Ib.*

* Clause, omitted here, should be consulted in c. 105, on the question whether the act is now applicable to subsequently appointed notaries.

PARTIES.

6. An action by the vendor of real estate to recover, as unpaid purchase-money, a portion of the price paid in railroad bonds, on the ground of fraudulent representations by the vendee as to those bonds, and to charge the recovery as a lien on the land, is an action affecting the title to real property; and a notice of *lis pendens* may be filed. The question whether the action is sustainable can not be considered on a motion to cancel the *lis pendens*. *Ct. of Appeals*, 1873, *Mills v. Bliss*, 55 *N. Y.*, 139.
7. The right to file a notice of *lis pendens* in all actions affecting the title to real property, is an absolute one [Code of Pro., § 132], not depending on the discretion of the court [5 *Duer*, 631]; and a notice once filed in a proper action, the court can only order canceled, or derogate from its efficiency, when the action shall be settled, discontinued, or abated. *Ib.*
8. Otherwise, *it seems*, of a notice filed in a case not affecting real property, and not authorized by statute. *Ib.*
9. *Lis pendens* does not affect judicial sale. *Becker v. Howard*, 4 *Hun*, 359; reversing 47 *How. Pr.*, 423.
10. Effect of *lis pendens* in ejectment. *Thompson v. Clark*, 4 *Hun*, 164.

OFFICERS.

A court of equity exercises its peculiar jurisdiction over public officers to control their action, only to prevent a breach of trust affecting public franchises or some illegal act under color or claim of right affecting injuriously the property rights of individuals. It has, as such court, no supervisory power over public officials or public bodies even in a suit brought by the state; and only takes cognizance of a cause concerning them when a case is made falling within a recognized head of equity jurisdiction. *Ct. of Appeals*, 1874, *People v. Canal Board*, 55 *N. Y.*, 390; affirming 1 *Supreme Ct. (T. & C.)* 309.

PARTIES.

1. Rights of parties similarly situated, to come in under general decree. *Prouty v. Michigan S. & N. Indiana R. R. Co.*, 1 *Hun*, 655.
2. Right of creditor in interest to intervene. *Schenck v. Ingraham*, 5 *Hun*, 397.
3. Action for deceit survives defendant's death. Severance thereafter. *Bond v. Smith*, 4 *Hun*, 48.
4. Representatives having revived action, not allowed to retract. *Arthur v. Griswold*, *Ante*, 235.

PARTIES.

5. Foreign assignees in bankruptcy can not sue residents, &c. *Mosselman v. Caen*, 1 *Hun*, 647.
6. Action to rescind lunatics' contract is properly brought by committee. *Fields v. Fowler*, 2 *Hun*, 400.
7. Defendant in action against heirs and devisees, legatees, heirs, &c. Remedy against for debt of decedent. *Rockwell v. Geery*, 4 *Hun*, 606.
8. Since *L.* 1860, ch. 90, when a married woman labors for another than her husband or family, she can in her own name recover damages from a wrong-doer for an injury to her person which disables her from performing such labor. *Com. of Appeals*, 1873, *Brooks v. Schwerin*, 54 *N. Y.*, 343.
9. Services rendered by the wife in the household, however, still belong to her husband, and so far as the injury causes the loss of such services to him, he, and not she, can recover. *Id.*
10. *It seems*, that a married woman may now sue her husband to enforce any right affecting her separate property in any form of action in the same manner that she might any stranger. *Com. of Appeals*, 1873, *Wright v. Wright*, 54 *N. Y.*, 437.
11. That a married woman, sued on a contract made, apparently, in a separate business, can not plead the non-joinder of her husband, a dormant partner,—see *Scott v. Conway*, 58 *N. Y.*, 618.
12. An action by a judgment creditor of a corporation with execution returned unsatisfied, against a stockholder holding a portion of the assets of the corporation which have been distributed among its stockholders, to recover the amount of his debt, may, but need not necessarily, be in behalf of other creditors; and the other stockholders may, but need not, be joined as defendants. *Com. of Appeals*, 1874, *Bartlett v. Drew*, 57 *N. Y.*, 587; affirming 60 *Barb.*, 648; *S. C.*, 4 *Lans.*, 444.
13. An action to reach funds here, of dissolved foreign corporation. *Redmond v. Hoge*, 3 *Hun*, 171.
14. Fraudulent purchaser of corporate property, a proper defendant in stockholder's action. *Gray v. N. Y. & Virginia Steamship Co.*, 3 *Hun*, 383.
15. Railroad superintendent, not proper party in action for possession. *Ogdensburgh & Champlain R. R. Co. v. Vermont, &c., R. R. Co.*, *Ante*, 249; affirmed in 4 *Hun*, 712.
16. Right of railroad bondholders to sue for benefit of selves and others. *Weetjen v. St. Paul & Pacific R. R. Co.*, 4 *Hun*, 529.
17. Necessary plaintiffs in ejectment for breach of condition subsequent. *Cook v. Wardens & Vestry of St. Paul's Church*, 5 *Hun*, 293.

PARTIES.

18. Joinder of defendants under civil damage act. *Jackson v. Brookins*, 5 *Hun*, 530.
19. Whenever a wrong is founded on a breach of contract, the plaintiff suing thereon must be a party or privy to the contract. [5 *M. & W.*, 283; 8 *Ell. & Bl.*, 1035.] *Ct. of Appeals*, 1874, *Clancy v. Byrne*, 56 *N. Y.*, 129; reversing 65 *Barb.*, 344.
20. Junior mortgagees, proper parties to the foreclosure of a prior mortgage, and if joined, estopped by the decree from afterward impeaching the prior mortgage. *Benjamin v. Elmira & Jefferson R. R. Co.*, 54 *N. Y.*, 675.
21. An action will lie against the representatives of a deceased partner for the recovery of a partnership debt, after the recovery of a judgment therefor against the survivor, and the return of an execution thereon unsatisfied, notwithstanding it may be shown that the survivor had property out of which the execution might have been satisfied, which was not discovered by the sheriff. Inability to collect from the survivor is as well shown by a *bona fide* effort to exhaust the remedy at law as by averring insolvency. *Ct. of Appeals*, 1873, *Pope v. Cole*, 55 *N. Y.*, 124; affirming 64 *Barb.*, 406.
22. Proceedings supplementary to execution are not necessary. *Supreme Ct.*, 1872, *Pope v. Cole*, 64 *Barb.*, 406; *S. C.*, 66 *Id.* 282.
23. As to remedy against legal representatives of deceased, after receiver appointed of survivor, see also *Yates v. Hoffman*, 5 *Hun*, 118.
24. An action for an accounting for money received by a firm, cannot be sustained against one member sued alone, on the mere ground that the power of attorney under which it was collected directed it to be paid to him. *Com. of Appeals*, 1873, *Isham v. Phelps*, 54 *N. Y.*, 673.
25. An action for injuries received through the negligence of an employee of a general partnership, may be brought against any one or more, or against all of its partners. *Ct. of Appeals*, 1874, *Roberts v. Johnson*, 58 *N. Y.*, 613.
26. The retiring partner took from his co-partner an agreement, guaranteed by a third person, that the co-partner continuing the business would pay firm debts due to plaintiffs and others. *Held*, that the plaintiffs having taken an assignment of the agreement and guaranty, could sue thereon for their demand. *Com. of Appeals*, 1874, *Clafin v. Ostrom*, 54 *N. Y.*, 581.
27. In a very similar case, *held*, that they could not, as against the offset of a note given by the retiring partner to the other. *Ct. of Appeals*, *Merrill v. Green*, 55 *N. Y.*, 270.

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28. Joint sureties who have jointly paid an undertaking, may join in action for fraud in inducing them to sign it. *Bates v. Merrick*, 2 *Hun*, 568.
29. Joinder of maker and guarantor of note. *Barton v. Spies*, 5 *Hun*, 60.
30. Proper party plaintiff in an action for seduction. *Furman v. Van Sise*, 56 *N. Y.*, 485.
31. Necessary parties plaintiff in specific performance. *McCotter v. Lawrence*, 4 *Hun*, 107.
32. One of several judgment debtors not appearing to be a party to the alleged fraudulent conveyance by the other, is not a necessary party to a creditor's bill to set it aside. *Com. of Appeals*, 1873, *Fox v. Moyer*, 54 *N. Y.*, 125.
33. People's action for municipal fraud. *People v. Tweed*, 5 *Hun*, 353; *People v. Ingersoll*, 58 *N. Y.*, 1; *People v. Fields*, 58 *N. Y.*, 491; *People v. Canal Board*, 55 *N. Y.*, 390; *L.* 1875, p. 43, c. 49.
34. The people of the state can not bring civil action for the redress of civil wrongs sustained by some citizens at the hands of other citizens. *Com. of Appeals*, 1874, *People v. Albany & Susquehanna R. R. Co.*, 57 *N. Y.*, 161; reversing in part, and affirming in part, 5 *Lans.*, 25.
35. An action by the people of the state to determine the right of conflicting claimants to the offices in a business corporation can not be sustained on the ground that it is necessary to stop numerous litigations and a conflict with judicial authority, disturbing the peace, nor on the ground that an illegal issue of stock was involved, nor on the ground that the governor desired such relief. *Id.*
36. Parties to suit against municipal officers, not being a corporation. *Lutes v. Briggs*, 5 *Hun*, 67.
37. Under 2 *L.* 1867, p. 1843, c. 747, § 3, providing that if certain town commissioners should neglect to account, "the supervisors, on behalf of such town, shall bring an action to compel," &c., the supervisor may sue in his own name as supervisor. [26 *N. Y.*, 514.] *Ct. of Appeals*, 1874, *Griggs v. Griggs*, 56 *N. Y.*, 504; affirming 66 *Barb.*, 287.
38. Substitution of consolidated corporations. *Supervisors of N. Y. v. Tweed*, 3 *Hun*, 682; *Prouty v. Michigan S. & N. Indiana R. R. Co.*, 1 *Hun*, 655.
39. Where the capacity of the plaintiff, and to some extent the frame of the action, was changed by supplemental proceeding after it had been commenced,—*held*, that the fact that parties having no right to the new relief were co-plaintiffs, did not render the judgment irregular. *Ct. of Appeals*, 1874, *Haddow v. Lundy*, 59 *N. Y.*, 320.

PLEADING.

PARTITION.

1. Plaintiff's right to a vested remainder (subject to a life estate) in an undivided half, subject to be defeated by his death without issue before his co-tenant, with a contingent remainder in the other half, dependent on the death of the co-tenant without issue, gives the court jurisdiction under the statute. [15 N. Y., 617.] *Ct. of Appeals*, 1874, *Howell v. Mills*, 56 N. Y., 226 ; affirming 7 *Lans.*, 198.
2. Remainderman may sue for. *Sullivan v. Sullivan*, 4 *Hun*, 198.
3. Not the appropriate proceeding in which to test the validity of a will. *Ct. of Appeals*, 1875, *Van Schuyver v. Mulford*, 59 N. Y., 426.
4. Unknown owners in partition suits can be brought in as parties only, by the publication of notice as prescribed in 2 *R. S.*, 186, § 184, as amended by *L.* 1842, Ch. 277, § 4. [Code of Pro., § 448.] *Ct. of Appeals*, 1874, *Sandford v. White*, 56 N. Y., 359 ; affirming 1 *Supreme Ct. (T. & C.)* 647 ; *S. C.*, 46 *How. Pr.*, 205.
5. A referee in partition proceeding under the general rule [79 & 80] requiring him to ascertain the amount due any party having a general or specific lien, has power to take proof, and pass on the questions of the validity of a lien of a party which has been contested before him, although the question is not raised by the pleadings nor by any formal issue. *Ct. of Appeals*, 1874, *Halsted v. Halsted*, 55 N. Y., 442.
6. Issues for jury to be settled in action under *L.* 1853, c. 238. *Hewlett v. Wood*, 1 *Hun*, 478.
7. Fees of the commissioners. *Campbell v. Campbell*, 48 *How. Pr.*, 255.
8. An action for partition brought under *L.* 1853, ch. 238, allowing heirs-at-law, though not in possession, to bring partition and contest the validity of a devise under which the lands are held, has the incidents and results of an ordinary action of partition, and the judgment therein can only be reviewed in the court of appeals in the manner prescribed by the Code, and where the judgment was affirmed by the general term, the court of appeals can only review questions of law. *Ct. of Appeals*, 1873, *Hewlett v. Wood*, 55 N. Y., 634.

PLEADING.

1. While the pleader is entitled to the benefit of all he alleges, and a

PLEADING.

- fair and reasonable, not a harsh or technical rule, of construction, yet if a material allegation is omitted, the presumption is against the existence of the matter; for the court may infer that the party stated his defense as favorably as possible for himself. *Ct. of Appeals*, 1874, *Hofheimer v. Campbell*, 59 *N. Y.*, 269; affirming 7 *Lans.*, 157.
2. But a liberal interpretation must be given to pleadings to sustain verdicts and judgments when parties have not been misled to their prejudice, or injustice done. *Ct. of Appeals*, 1874, *Graves v. Waite*, 59 *N. Y.*, 156. There is a memorandum of the decision below in 1 *Supreme Ct. (T. & C.) Adden.* 16.
 3. The rule of § 176 of the Code, that every error or defect in pleadings, not affecting substantial rights of the adverse party, is to be disregarded, applies on demurrer; and a substantial allegation of a statutory condition is sufficient. Thus, under *L.* 1872, c. 161, giving an action to one who has paid taxes in a town within one year previous to the commencement of the action, an allegation that plaintiff is, &c., and was, &c., before and at the time of the occurrence of the several acts mentioned in the complaint, is sufficient on demurrer. *Ct. of Appeals*, 1874, *Ayers v. Lawrence*, 59 *N. Y.*, 192.
 4. Complaint not fatally bad because not indicating whether the action is legal or equitable. *Com. of Appeals*, 1874, *Rindge v. Baker*, 57 *N. Y.*, 209.
 5. After an action had been brought for an accounting and the protection of the trust fund until plaintiff could secure administration, she obtained administration, and this fact defendant set up as answer to defeat the action. *Held*, that the action need not be abandoned; and that plaintiff's omission to aver the taking out of letters, &c., could be supplied from defendant's answer; and she was entitled to full relief. *Ct. of Appeals*, 1874, *Haddow v. Lundy*, 59 *N. Y.*, 320.
 6. Though the facts stated in the complaint would sustain an action at law, if they also entitle plaintiff to equitable relief, the character of the action must be determined by the frame of the complaint and the prayer for relief. *Ct. of Appeals*, 1873, *Mills v. Bliss*, 55 *N. Y.*, 139.
 7. If the complaint state facts constituting a cause of action, and defendant answers, the court should afford the appropriate relief, whether the frame of the complaint be legal or equitable. [2 *Kern.*, 336; 20 *N. Y.*, 64; 40 *Id.*, 207; 42 *Id.*, 593.] *Com. of Appeals*, 1874, *Wright v. Wright*, 54 *N. Y.*, 437; affirming 59 *Barb.*, 505.
 8. Recovery on contract sustained on complaint for agent's conversion. *Sheahan v. Shanahan*, 5 *Hun*, 461.

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9. Complaint for deceit in obtaining forbearance, *held* tort and not contract. *Peck v. Root*, 5 *Hun*, 547.
10. Plaintiff not compelled to elect between allegations of evidence. *People v. Tweed*, 5 *Hun*, 353.
11. Misjoinder of defendants and misjoinder of causes of action. *Jackson v. Brookins*, 5 *Hun*, 530.
12. What is single cause of action for services. *Evans v. Kalbfleisch*, *Ante*, 13.
13. Complaint for several kinds of relief, not necessarily on several causes of action. *Hammond v. Cockle*, 2 *Hun*, 495.
14. The omission to answer over after demurrer admits the allegations of the complaint; and plaintiff may insist upon the admission, although he offers evidence also, and does not object to defendants offering evidence. *Ct. of Appeals*, 1874, *Darling v. Brewster*, 55 *N. Y.*, 667.
15. Effect of demurrer for want of jurisdiction. *Ogdensburgh & Champlain, R. R. Co. v. Vermont, &c., R. R. Co.*, *Ante*, 249; affirmed in 4 *Hun*, 712.
16. Demurrer sustainable for want of allegation which demurrant moved to strike out. *Grout v. Cooper*, 5 *Hun*, 423.
17. Date of jurat of complaint, not enough to support demurrer on ground that action is premature. *State Bank of Olean v. Shaw*, 5 *Hun*, 114.
18. A party has a right to have a demurrer heard in the county designated in the complaint. *Christy v. Kiersted*, 47 *How. Pr.*, 467.
19. "Says he denies," not a denial. *People v. Christopher*, 4 *Hun*, 805.
20. Denial on information and belief, bad. *Powers v. Rome, Water town & Ogdensburgh R. R. Co.*, 3 *Hun*, 285.
21. An answer alleging that as to certain specified matters alleged in the complaint defendant has no knowledge or information sufficient to form a belief, is not a denial; and adding a general denial of all allegations of the complaint not specifically answered unto, does not put in issue such matter. *Ct. of Appeals*, 1874, *People v. Fields*, 58 *N. Y.*, 491.
22. Denial of knowledge or information sufficient, &c. *Meehan v. Harlem Savings Bank*, 5 *Hun*, 439.
23. The rule (Code of Pro., § 148) that insufficiency of the complaint is not waived by omission to object by answer or demurrer, does not render an objection available on appeal, if not taken at the trial, and if it might have been cured by amendment. *Ct. of Appeals*, 1874, *Hofheimer v. Campbell*, 59 *N. Y.*, 269; affirming 7 *Lans.*, 157.

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24. In an action on an award, allegations in the answer, of irregularities in the submission and arbitration, may, under the Code, be deemed an application to the equitable powers of the court to set aside the award. *Day v. Hammond*, 57 N. Y., 479.
25. Supplementary complaint can not set up new claim not existing when action was commenced. *Tiffany v. Bowerman*, 2 Hun, 643.
26. Section 177 of the Code providing for a supplemental answer to set up facts occurring after answer, is a substitute for the former practice of a plea at law *puis darrien*, and of supplemental answer in equity; with this distinction, however, that the supplemental answer now does not take the place of the original, but is in addition to it; and in an action of a legal nature, a supplemental answer ought always to be allowed wherever a plea *puis darrien* could have been put in as matter of right under the former practice. *Ot. of Appeals*, 1874, *Holyoke v. Adams*, 59 N. Y., 233; affirming in effect 1 Hun, 223; 2 *Supreme Ct. (T. & C.)* 1.
27. A written instrument in form of a bond, but not sealed, and with a condition of defeasance, is admissible in evidence to support a general allegation of having agreed, &c. It is enough to allege the contract without specifying the evidence. *Com. of Appeals*, 1874, *Tuttle v. Hannegan*, 54 N. Y., 686; affirming 4 *Daly*, 92.
28. Although the complaint is upon a contract for a specific sum, the plaintiff can recover for the value of his services, on proof thereof, especially where there are sufficient averments to enable him to recover without reference to the allegation of an agreed compensation. *Ot. of Appeals*, 1873, *Sussdorff v. Schmidt*, 55 N. Y., 319.
29. Plaintiff alleged work done and materials furnished by plaintiffs for defendant, and at his request, with particulars, and defendant's answer admitted that plaintiffs had performed work and furnished materials for him, as alleged, and denied merely their value and his promise to pay, and alleged payment. *Held*, that evidence offered by defendant to show that the work and materials had not been done and furnished, was not admissible. *Com. of Appeals*, 1874, *Van Dyke v. Maguire*, 57 N. Y., 429.
30. Under a general denial in the answer in an action for conversion, defendant may give evidence explaining his failure to deliver, *e. g.*, that he delivered to a third person who by the course of business between the parties was apparently authorized to receive. *Ot. of Appeals*, 1875, *Ontario Bank v. N. J. Steamboat Co.*, 59 N. Y., 510.
31. Under a general denial in an action for conversion, any matter in reduction of damages is admissible, *e. g.*, in case of conversion of a note, an unauthorized alteration by the plaintiff. [41 N. Y., 349.]

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- Ct. of Appeals*, 1874, *Booth v. Powers*, 56 *N. Y.*, 22; reversing *Flint v. Craig*, 59 *Barb.*, 319.
32. Under a general denial in an action for services, defendant cannot prove plaintiff's conversation of the thing in respect of which the services were alleged to have been rendered. *Com. of Appeals*, 1873, *Wood v. Belden*, 54 *N. Y.*, 658; reversing 59 *Barb.*, 549.
33. Under a general denial, defendant may show that he acted in the contract sued on as agent for another, and on his credit, plaintiff knowing of the agency. *Com. of Appeals*, 1874, *Merritt v. Briggs*, 57 *N. Y.*, 651.
34. Under a general denial in an action against the sureties on a bond to indemnify the sheriff for levying, proof that the sheriff collected a part of the sum is admissible, for it merely controverts a fact which plaintiff must establish, viz., the amount of damages. *Ct. of Appeals*, 1873, *O'Brien v. McCann*, 58 *N. Y.*, 373.
35. In an action upon a sealed instrument, failure of consideration can not be proved under a general denial. [2 *N. Y.*, 157; 49 *Id.*, 286.] *Ct. of Appeals*, 1874, *Dubois v. Hermance*, 56 *N. Y.*, 673; affirming 1 *Supreme Ct. (T. & C.)* 293.
36. Prematureness of action available under general denial. *Mack v. Burt*, 5 *Hun*, 28.
37. Defense of disability to bring the present suit without suggesting any infirmity in the plaintiff's right, is dilatory, and to be pleaded strictly. *Wright v. Wright*, 54 *N. Y.*, 437.
38. The objection that the plaintiff suing here, was a resident under the hostile government when his action was begun, being a technical and dilatory defense growing out of a supposed temporary disability, must, to be effectual, be pleaded specially. [1 *Chitt. Pl.*, 234, 446, 448, 479; 10 *Johns.*, 183.] *Com. of Appeals*, 1873, *Burnside v. Matthews*, 54 *N. Y.*, 78.
39. Admission of the obligation of a law in pleading, does not estop the party from contesting it, since matters of law are not properly pleadable. *Com. of Appeals*, 1873, *People ex rel. Purdy v. Commissioners of Marlborough*, 54 *N. Y.*, 276.
40. After a party has appeared and pleaded in an action, he is entitled to notice, and to be heard before the granting of an order striking out his pleading and precluding him from any defense therein, although the order be made in the alternative and as imposing a penalty, if he do not produce certain books. *Ct. of Appeals*, 1874, *Rice v. Ehele*, 55 *N. Y.*, 518; reversing 65 *Barb.*, 185; *S. C.*, 46 *Hov. Pr.*, 153.
41. Before such order can be made absolute, it must be shown to the

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- court, upon notice to the party, that he has failed to comply with the condition imposed. *Ib.*
42. Where fraud in inducing credit is alleged, an answer denying the fraud is not frivolous. *Griffin v. Todd*, 48 *How. Pr.*, 15.
43. The allegation in the complaint that "the defendant has become possessed of, by forcibly taking from the plaintiffs, and wrongfully detains from the plaintiffs, the following goods and chattels of the plaintiffs," sufficiently states ownership in the plaintiffs in an action to recover possession of personal property. [7 Hill, 126.] *Ct. of Appeals*, 1874, *Simmons v. Lyons*, 55 *N. Y.*, 671.
44. A complaint in an action for possession of lands by several persons, each claiming the whole land, by a title hostile to that of the others, is bad on demurrer for joining causes of action that can not be united, and it makes no difference whether the complaint sets forth the opposing titles in one count or in separate counts. [Code of Pro., § 167, 22 Barb., 362; affirmed in 4 Abb. Ct. App., Dec.] *Ct. of Appeals*, 1874, *Hubbell v. Lerch*, 58 *N. Y.*, 237; affirming 62 Barb., 295.
45. Evidence of the value of the use and occupation of premises is not admissible in behalf of the plaintiff, in a suit for the recovery of real property, and for damages in withholding the same from the owner, where the complaint does not claim the rents and profits. [12 Barb., 481.] *Com. of Appeals*, 1874, *Larned v. Hudson*, 57 *N. Y.*, 151.
46. Complaint on note indorsed to give credit with payee. *Woodruff v. Leonard*, 1 *Hun*, 632.
47. Complaint by several foreign executors on note given to one on compromise. *Leland v. Manning*, 4 *Hun*, 7.
48. In an action by a carrier for freight, defendant can set up in his answer any breach of his contract by plaintiff, and have whatever damages resulted therefrom applied upon the claim of the plaintiff. [Code of Pro., § 150.] *Ct. of Appeals*, 1874, *Gleadell v. Thomson*, 56 *N. Y.*, 194; affirming 35 *N. Y. Superior Ct.* (3 J. & S.) 232.
49. In an action against carriers of passengers, the complaint is not insufficient because the allegation of hire is confined to the statement that plaintiff was carried, instead of being applied to the business of defendant generally. *Ct. of Appeals*, 1874, *Roberts v. Johnson*, 58 *N. Y.*, 163; affirming 37 *N. Y. Superior Ct.* (5 J. & S.) 157.
50. Removal of cloud on title under complaint demanding ejectment. *Zimmerman v. Schoenfeldt*, 3 *Hun*, 692.
51. Necessity of allegation of fact showing damage in action for refusal to fulfil contract of purchase. *Thompson v. Gould*, *Ante*, 424.

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52. The complaint in an action for breach of contract contained allegations of fraudulent representations inducing the contract, and demanded judgment for the amount presented by the contract, "or for such other or different sum as shall indemnify this plaintiff for the damages he has sustained by and in consequence of the wrongful and fraudulent acts of said defendant as aforesaid," &c. *Held*, this was an action for a money demand on contract, notwithstanding the summons was for relief; and that the allegations of fraud were not issuable, and plaintiff was entitled to recover on proof of the breach of contract without proof of the fraud. *Ct. of Appeals*, 1874, *Graves v. Waite*, 59 *N. Y.*, 156. There is a mem. of the decision below in 1 *Supreme Ct. (T. & C.) Adden.* 16.
53. Assignor of contract must deny offer of performance both to assignee and to himself. *Thompson v. Gould*, *Ante*, 424.
54. Allegations in an answer of false representations, to be available as a defense to an action founded on the contract induced thereby, must be stated to have been made with intent to defraud. [52 *N. Y.*, 621; 45 *N. Y.*, 760.] *Ct. of Appeals*, 1874, *Dubois v. Hermance*, 56 *N. Y.*, 673; affirming 1 *Supreme Ct. (T. & C.)* 293.
55. A complaint in an action for deceit in the sale of stock, alleging that defendants fraudulently stated to plaintiff that it was worth at least 80 per cent. of its par value, which statement plaintiff believed to be true, &c., does not state facts sufficient to constitute a cause of action, though it would be otherwise of statements as to the market price of the stock. *Ct. of Appeals*, 1874, *Ellis v. Andrews*, 56 *N. Y.*, 83.
56. Time of discovering deceit must be stated. *Challis v. Osborn*, *Ante*, 80.
57. Mode of pleading adultery. *Trim v. Trim*, *Ante*, 39.
58. Pleading in people's action for municipal fraud. *People v. Tweed*, 5 *Hun*, 353.
59. In answer to action for libel, publication with good motives may be alleged. *Jeffras v. McKillop & Sprague Co.*, 2 *Hun*, 351.
60. The rules of pleading defense on libel, applied to a charge of being concerned in frauds on the city treasury. *Kelly v. Taintor*, 48 *How. Pr.*, 270.
61. Violation of statute as to false partnership names, not available as defense unless pleaded. *O'Toole v. Garvin*, 1 *Hun*, 92.
62. In an action for specific performance of a contract to convey land, plaintiff may ask for damages for breach of the contract, if for any reason it can not be performed, and in that case can recover such

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- damages. [24 N. Y., 40; 40 Id. 504; Id. 59.] *Com. of Appeals*, 1874, *Margraf v. Muir*, 57 N. Y., 155.
63. Complaint on undertaking on appeal. *Porter v. Kingsbury*, 5 Hun, 597.
64. Requisites of complaint on undertaking, on appeal, to recover damages for fraud inducing plaintiffs to sign. *Bates v. Merrick*, 2 Hun, 568.
65. Requisites of pleading lien on ships under act of 1862. *Moore v. Lunt*, 1 Hun, 650.

COUNTER-CLAIM.

POSSESSION (WRIT OF).

66. Time for execution of writ of, and time to redeem. *Witbeck v. Van Rensselaer*, 2 Hun, 55.

PRINCIPAL AND AGENT.

1. Effect of husband's wrongful diversion of money borrowed on wife's estate. *Denman v. Jayne*, *Ante*, 317.
2. Principal when liable to arrest for fraud by agent. *Hathaway v. Johnson*, 55 N. Y., 93.

PRINCIPAL AND SURETY.

- Grantee of land subject to judgment, a mere surety. *Barnes v. Mott*, *Ante*, 57.

PROMISE OF MARRIAGE.

1. In consideration of fornication. *Steinfeld v. Levy*, *Ante*, 26.
2. Nature of liability for breach of promise. *Wade v. Kalbfleisch*, *Ante*, 104.

PROVISIONAL REMEDIES.

1. An order of arrest and a writ of attachment, are not so inconsistent in their nature as that the allowance of both in the same action will render both void or irregular. *Ot. of Appeals*, 1874, *Rockford, Rock Island & St. Louis R. R. Co. v. Boody*, 56 N. Y., 456.
2. *It seems* that both may be allowed as concurrent remedies. *Ib.*
3. Whether the party can, in the discretion of the court, be confined to one of these remedies, in a case where he is entitled to one as well as the other—*quære*. *Ib.*

QUESTIONS OF LAW AND FACT.

1. Conflict between matter of fact and testimony to legal conclusion. *Sanborn v. Lefferts, Ante, 42.*
2. Where some witnesses testified they heard the bell ring, and others that they did not; *held*, the question of negligence was for the jury. *Ct. of Appeals, 1874, Roach v. North Side R. R. Co., 58 N. Y., 626; Salter v. Utica & Black River R. R. Co., 59 N. Y., 631.*
3. In an action to recover commissions as a broker—*held*, that on the facts, the question whether plaintiff acted as defendant's broker was for the jury. *Thornal v. Pitt, 58 N. Y., 683.*
4. The question of the materiality of a variance between the terms of a contract and the performance offered, where it is an inference to be drawn from the surrounding circumstances,—*e. g.*, the eligibility of the property for stores,—is a question of fact; where it turns upon the construction of the instrument, a question of law. *Com. of Appeals, Stokes v. Johnson, 57 N. Y., 673.*
5. The question of the power of a stockbroker buying on a margin to sell, if it depends upon the construction of writings between the parties, is a question of law merely. [52 N. Y., 191.] *Com. of Appeals, 1874, Davis v. Gwynne, 57 N. Y., 676.*
6. What is reasonable time in such a case, *held*, also a question of law. [34 N. Y., 548, 553; 3 Id., 272; 49 Id., 223.] *Ib.*
7. Under 1 R. S., 728, §§ 51, 52—declaring that conveyances made for a consideration paid by a third person, shall be presumed fraudulent as against the creditors of the payer—the presumption is not conclusive, but makes the question of fraud a question of fact. *So held*, where the conveyance was to the wife of the payer. *Ct. of Appeals, 1874, Dunlap v. Hawkins, 59 N. Y., 342; affirming 2 Supreme Ct. (T. & C.) 292.*
8. Fraud in transfer of goods, a question for the jury. *Hollacher v. O'Brien, 5 Hun, 277.*
9. The question whether the risk, under a policy of insurance, by the presence of a small quantity of combustibles, not involved in the fire, conditioned to become void if the risk should be increased, is for the jury to determine. *Com. of Appeals, 1874, Williams v. People's Fire Ins. Co., 57 N. Y., 274.*
10. As matter of law, it is not always negligence and want of ordinary care for a person to alight from a railway train while it is in motion [49 N. Y., 47], nor is it always a question for the jury. This fact is a principal one to be considered with the others, and if

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- enough are undisputed, the question may be one of law. *Ct. of Appeals*, 1874, *Morrison v. Erie Railway Co.*, 56 *N. Y.*, 302.
11. The question held, under the circumstances, to be a question of law. *Ib.*
 12. Conflicting testimony as to the speed of driving and care in looking for danger, *held* to create a question for the jury. *Kissenger v. N. Y. & Harlem R. R. Co.*, 56 *N. Y.*, 538.
 13. Whether specified acts amount to waste or permanently injure the estate, when it depends on the situation of the property involving a variety of circumstances, is a question for the jury. *Com. of Appeals*, 1874, *Agate v. Lowenbein*, 57 *N. Y.*, 604; reversing 4 *Daly*, 262.
 14. Extrinsic facts being uncontroverted, the construction of the language of a will is not for the jury, but for the court. *Ct. of Appeals*, 1874, *Underhill v. Vandervoort*, 56 *N. Y.*, 242.

QUO WARRANTO.

1. In an action by the attorney-general in the name of the people, to try the title to an office, the defendant must show, before he can have judgment in his favor, that he has a legal title to the office. Possession is not, in such an action, evidence of his right. The modern action by the people is subject, in this respect, to the old rules in quo warranto. Defendant must show by affirmative evidence that his possession is legal and rightful. *Ct. of Appeals*, 1874, *People ex rel. Judson v. Thacher*, 55 *N. Y.*, 525; dismissing appeal from 1 *Supreme Ct. (T. & C.)* 158; *S. C.*, 7 *Lans.*, 274.
2. Failure of the defendant, however, to prove his title does not establish that of the relator. Upon that issue the plaintiffs have the affirmative. *Ib.*

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1. Contracts of connecting roads. *Ogdensburgh & Champlain R. R. Co. v. Vermont, &c., R. R. Co.*, *Ante*, 249; affirmed in 4 *Hun*, 712.
2. Liability of palace car company for baggage. *Welch v. Pullman Palace Car Co.*, *Ante*, 352.
3. Persons hereafter (June 7, 1875) performing any labor for a railroad corporation, may secure lien for its value on their track, rolling stock, appurtenances, and land, to be enforced as herein prescribed. Personal liability of stockholders declared. *L.* 1875, p. 454, c. 392.
4. Requisites of petition for additional land. *Matter of N. Y. Central & Hudson River R. R. Co.*, 4 *Hun*, 381; 5 *Ib.*, 86.

RECOGNIZANCES.

5. Burden and mode of proof under petition. Matter of N. Y. Bridge Co., 4 *Hun*, 635.
6. Section 26 not compulsory. Matter of N. Y. Bridge Co., 4 *Hun*, 635.
7. The general railroad act, L. 1850, c. 140, § 18, prescribing that the determination of the commissioners in their second report shall be final and conclusive, is a bar as well to a review by a common law certiorari as to an appeal. *Ct. of Appeals*, 1874, *People ex rel Schuylerville, &c., R. R. Co., v. Betts*, 55 *N. Y.*, 600.
8. Commissioners report set aside for misbehavior. Matter of N. Y. Central, &c., R. R. Co., 5 *Hun*, 105.

RECEIVER.

1. Property to be delivered to persons having legal title without unnecessarily passing through hands of receiver. *Ct. of Appeals*, 1874, *Haddow v. Lundy*, 59 *N. Y.*, 320.
2. Of debtor's property after unsettled assignment. *Merritt v. Scott*, 3 *Hun*, 657.
3. How vacated when appointment is collusive. *Wilson v. Barney*, 5 *Hun*, 257.
4. Allowed to carry on contract. *Heatherton v. Hastings*, 5 *Hun*, 459.
5. Remedy for third person to review accounts. *Schenck v. Ingraham*, 5 *Hun*, 397.
6. Claim against for services may be set-off. *Davis v. Storer*, *Ante*, 225.

RECOGNIZANCES.

1. The provisions of L. 1855, c. 202, subjecting actions upon recognizances to the provisions of the Code, does not repeal L. 1844, c. 315, authorizing summary proceedings on recognizances in the city and county of New York. Moreover, the last-named act is declared to be in force by L. 1861, c. 333, *Ct. of Appeals*, 1874, *People v. Quigg*, 59 *N. Y.*, 83.
2. The act, L. 1844, c. 315, a. 4, § 8, as to filing forfeited recognizances which were "given to answer to a charge preferred, or for good behavior, or to appear and testify," &c., applies equally to recognizance taken after indictment as those taken before a committing magistrate. *Id.*
3. The remedy on forfeited recognizances under L. 1844, c. 315, is cumulative to, and distinct from, that under L. 1839, c. 343. *Id.*

REFERENCE.

RECORDING.

1. One who lends money on receiving a mortgage, under the false representation of the borrower that he is already owner of the premises, can not, when the mortgagor has subsequently obtained title and given a purchase-money mortgage to his vendor, acquire priority for his mortgage over the purchase-money mortgage by diligence in recording it first, for the record only protects subsequent purchasers for value. The payment of value must be subsequent to the unrecorded instrument under this rule. *Ot. of Appeals*, 1875, *Dusenbury v. Hulbert*, 59 *N. Y.*, 541; reversing 2 *Supreme Ct. (T. & C.)* 177.
2. The record of a mortgage with warranty, executed before the mortgagor had the title to the property mortgaged, is constructive notice to one who purchased after the title was passed to the mortgagor; and though the purchaser took in good faith, he takes subject to such mortgage. [24 *Pick.*, 324.] *Com. of Appeals*, 1874, *Tefft v. Munson*, 57 *N. Y.*, 97; affirming 63 *Barb.*, 81.

REDEMPTION.

The remedy for one who takes mortgage before, but records it after, foreclosure commenced. *Ayrault v. Murphy*, 54 *N. Y.*, 203.

REFERENCE.

1. To justify a compulsory reference, all the causes of action must be referable. *Evans v. Kalbfleisch*, *Ante*, 13.
2. Attorney, if a party, may object to reference to an attorney. *Flanders v. Odell*, *Ante*, 247.
3. In what case long account is involved. *Flanders v. Odell*, *Ante*, 247; *Evans v. Kalbfleisch*, *Ante*, 13.
4. Although only three items of the account were disputed, yet as one involved a large number of bills and small charges,—*held*, that a reference was properly ordered. *Williams v. Allen*, 48 *How. Pr.*, 257.
5. If the cause of action stated by the complaint does not appear to involve a long account, an affidavit alleging that it will, is not enough. *Lord v. O'Connor*, 48 *How. Pr.*, 95.
6. Not necessary that all issues involve an account. *Place v. Chesebrough*, 4 *Hun*, 577.
7. Reference not refused on allegation of bad faith or insolvency. *Ib.*

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8. Reference ordered after interlocutory decree ; and change of referee. *Mundorff v. Mundorff*, 1 *Hun*, 41.
9. Effect of reference to try specific issue. *Thurber v. Chambers*, 4 *Hun*, 721.
10. Plenary power of court over surplus moneys. *Mut. Life Ins. Co. v. Salem*, 3 *Hun*, 117.
11. A referee should, if asked to do so, pass one way or the other upon every question of fact involved in the determination of a material issue, as a foundation for an application to the court for redress, if necessary. *Com. of Appeals*, 1873, *Meacham v. Burke*, 54 *N. Y.*, 217.
12. The party interested must, however, make the request to the referee so to find in order to make his refusal error. *Id.*
13. Though the referee pass upon the questions of fact in the form of a general verdict, when requested to find specifically, the party aggrieved must apply to the court for a re-settlement. Omitting to do this he can not obtain redress in the court of appeals. *Id.*
14. If, however, he make such application for a re-settlement to the court, and be denied, he can, on appeal to the general term and the court of appeals, bring up the materiality of the findings asked for. [46 *N. Y.*, 259.] *Id.*
15. A party seeking further findings from a referee should clearly specify the point, show that it is material, and that if found in his favor it would affect the judgment, and that there is evidence sustaining the finding. The refusal of a mere general motion for further findings on all the issues does not raise a question of law which will be reviewed by the court of appeals. [46 *N. Y.*, 259.] *Ct. of Appeals*, 1874, *Tallman v. Bresler*, 58 *N. Y.*, 123.
16. The proper remedy against a mere general report, is to move, not to strike out, but to send back ; but on such motion the desired findings must be specified and shown to be material and necessary, and to have been requested at the trial. *Supreme Ct., Sp. T.*, 1875, *Gove v. Hammond*, 48 *How. Pr.*, 385.
17. The appearance of a party upon an accounting in execution of an interlocutory decree, and the assertion of his claims thereat, do not waive his right to move for a new trial, on exceptions to the referee's report, upon which the decree was based, nor his right to appeal from an order denying a new trial [distinguishing 18 *N. Y.*, 481 ; 45 *Id.*, 207.] *Ct. of Appeals*, 1874, *Barker v. White*, 58 *N. Y.*, 204.
18. If upon the final submission of a cause to the referee, an oral agreement is made in open court, extending indefinitely the time within which the report may be delivered, the reference can not be

REMOVAL OF CAUSES.

terminated in the manner provided by section 273 of the Code. *Ct. of Appeals*, 1874, *Ballou v. Parsons*, 55 *N. Y.*, 673.

19. *It seems* that in such case the proper practice, in order to terminate the extension, is to serve notice upon the opposite party and the referee, that unless the report is made within a specified reasonable time, the reference will be deemed ended. *Ib.*

RELIGIOUS CORPORATIONS.

How far court will review determinations of ecclesiastical bodies. *Connitt v. Reformed, &c., Church*, 54 *N. Y.*, 551; 4 *Lans.*, 339.

REFORMATION OF INSTRUMENT.

To entitle one to a reformation of a contract (as distinguished from a decree cancelling it), he must prove the intent of both parties to make the contract which he seeks to establish, and fraud, accident, or mutual mistake frustrating this intent. [33 *N. Y.*, 676; 36 *Id.*, 678.] *Ct. of Appeals*, 1874, *Jackson v. Andrews*, 59 *N. Y.*, 244.

REMOVAL OF CAUSES.

1. Where in an action in a court of this state the defendant, a citizen of another state, complies with all the requirements of 1 *U. S. Stat. at L.*, p. 73, § 12, which provides for the removal of causes from the state to the U. S. courts, the state court has no further jurisdiction to proceed in the cause. *Com. of Appeals*, 1873, *Taylor v. Shew*, 54 *N. Y.*, 75.
2. While the judge in the state court has a right to be satisfied that the sureties on the bond for removal are good and sufficient, he can not arbitrarily refuse to receive the bond when regular on its face, without giving the party offering it an opportunity to correct it if insufficient in respect to sureties, and if he does so refuse, it is error. *Ib.*
3. Requisites of corporate petition for removal to U. S. Circuit Court. *Bell v. Lycoming Ins. Co.*, 3 *Hun*, 409.
4. Time to petition for, under act of 1875. *Warner v. Penn. R. R. Co.*, 6 *Hun*, 197.
5. *Law of 1872*, c. 299, and *L. 1874*, c. 545, authorizing removal to Marine Court, unconstitutional. *Hart v. Hatch*, 3 *Hun*, 375; *Alexander v. Bennett*, 60 *N. Y.*, 204.

SET-OFF.

RULES.

The power of the court to make general rules does not authorize rules inconsistent with the statutes; nor are such rules legalized by *L. 1870, c. 408*; continuing in force the rules of court. *Ct. of Appeals, 1874, Rice v. Ehele, 55 N. Y., 518*; reversing *65 Barb., 185, S. C., 46 How. Pr., 153*.

SECURITY FOR COSTS.

1. In county court. *Elliott v. Wood, 5 Hun, 594*.
2. Liability of attorney for non-resident. *Willmont v. Meserole, Ante, 308*.
3. *2 R. S. 620, § 6*, as to security for costs, which requires the sureties to justify, amended by prescribing qualifications of sureties, and mode of justifying, on notice. *L. 1875, p. 17, c. 16*.

SERVICE (AND PROOF OF).

1. Effect on attachment of omitting to serve summons. *Simpson v. Burch, 4 Hun, 315*; *Taddiken v. Cantrell, 1 Id., 710*.
2. Defects in copy of arrest papers served. *Bank of Havana v. Moore, 5 Hun, 624*.
3. In attorney's office when closed. *Vail v. Lane, 4 Hun, 653*.
4. On sheriff at his office. *Sherman v. Conner, Ante, 396*.
5. What proof is enough to justify order for service of summons by publication. *Handley v. Quick, 47 How. Pr., 233*.
6. Grounds of substituted service. *Simpson v. Burch, 4 Hun, 315*.
7. The provisions of § 135 of the Code, authorizing service by publication, and of § 175, authorizing the designation of defendant by a fictitious name, when his real name is not known, are not applicable to unknown owners in partition suits. *Ct. of Appeals, 1874, Sandford v. White, 56 N. Y., 359*; affirming *1 Supreme Ct. (T. & C.) 647*; *S. C., 46 How. Pr., 205*.
8. Requisites of evidence of service by publication. *Bixby v. Smith, 3 Hun, 60*.
9. The usual indorsement on envelopes, "if not called for, &c., return," vitiates service by mail. *Gaffney v. Bigelow, 48 How. Pr., 475*.

SET-OFF.

1. The power of a court of equity is incidental to the court, and may be exercised in an action brought for the purpose, in a case where

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- the demands are not in judgment. But where a judgment debtor sued the present plaintiff for false imprisonment, and employed an attorney on an agreement that the attorney should have out of any recovery, his costs and counsel fee, and also take whatever remained to pay a prior indebtedness due the attorney, and thereafter obtained a verdict for the false imprisonment, which he assigned to the attorney—*held*, that he being insolvent, and the recovery not arising out of the same transaction as the judgment of the judgment creditor, the attorney's equity was superior to that of the judgment creditor, and the latter could not maintain an action for a set-off. *Ct. of Appeals*, 1873, *Zogbaum v. Parker*, 55 *N. Y.*, 120; affirming 66 *Barb.*, 341.
2. In an action of foreclosure against the mortgagor and his surety, the former may set-off his individual debts. The right of set-off in foreclosure is not limited to the cases in which it was allowed at law. [Citing cases.] *Ct. of Appeals*, 1875, *Bathgate v. Haskin*, 59 *N. Y.*, 533.
 3. Where a bond is given upon the dissolution of a partnership, by the remaining to the retiring partner, and engaging to pay the whole of the partnership debts, a note given by the retiring partner to the one remaining, in settlement of the former's indebtedness to the firm, may be set-off in an action on the bond, brought by a creditor of the firm to whom the bond has been assigned. The liability in such case is to the obligee in the bond only. *Ct. of Appeals*, 1873, *Merrill v. Green*, 55 *N. Y.*, 270; affirming, but overruling in part, 65 *Barb.*, 270. Compare *Claffin v. Ostrom*, 54 *N. Y.*, 581.
 4. In an executor's or administrator's action on a cause of action which accrued after the testator's death,—*e. g.*, a bond given to the testator living, but payable after his death to his executor,—the debtor can not set-off a debt due him from the testator; but may set-off a debt of the estate which arose after the testator's death,—*e. g.*, funeral expenses. Under the statutes of set-off, the demands must be mutual; and right demands are not mutual unless both are payable [reviewing authorities]. *Ct. of Appeals*, 1874, *Patterson v. Patterson*, 59 *N. Y.*, 574.
 5. Section 23 of the statute of set-off does not allow debts which are not in this sense mutual to be set-off. *Ib.*
 6. Set-off of demand for fraud, against action by assignee of contract. *Harway v. Mayor, &c.*, of *N. Y.*, 1 *Hun*, 628.

SHERIFFS.

1. Action to enforce attached choses in action must be in sheriff's name. *Lupton v. Smith*, 3 *Hun*, 1.

SHERIFFS.

2. Conflicting claims between state sheriff and bankruptcy court. People *ex rel.* Jennys v. Brennan, 3 Hun, 666.
3. All orders of arrest, warrants of attachment, executions, and proceedings to recover personal property in civil actions, except when the sheriff is a necessary party thereto, made in issuing out of any court of record in the city and county of New York, whether by statute or otherwise, shall be issued to the sheriff only. L. 1875, p. 785, c. 625.
4. 2 L. 1869, p. 1377, c. 569, § 1, as to judicial sales of land in New York city, amended by L. 1874, p. 212, c. 192.
5. Process against a deputy sheriff can not be delivered to him to execute; and if the sheriff, upon an execution so executed, returns nulla bona, very slight evidence of possession of assets will sustain an action for false return. N. Y. Com. Pl., 1875, Holbrook v. Brennan, 48 How. Pr., 519.
6. While perhaps a sheriff could not maintain an action to recover possession or the value of property originally levied on by him under an execution void in fact, but sufficient to protect him in making the levy [16 Wend., 562; 1 Hill, 118; 2 Den., 643], still, the sheriff may, as against the debtor in the execution, or those claiming under him, retain possession of the property, and re-possess himself of it without undue violence. Com. of Appeals, 1873, Hill v. Haynes, 54 N. Y., 153.
7. But in case of his regaining possession out of the county by an alleged forcible re-taking, plaintiff, in an action for such alleged force, is entitled to an instruction to the jury that the sheriff had no more right to use force than a private individual would have had. *Ib.*
8. In the absence of request and promise to pay for services or disbursements, the sheriff is not entitled to any other fees than those expressly allowed by statute. Ct. of Appeals, 1874, Crofut v. Brandt, 58 N. Y., 106; S. C., 47 How. Pr., 263; affirming 46 *Id.*, 481, and 13 Abb. Pr., N. S., 128.
9. He can not, on an execution, claim extra fees for expense of keepers and watching, nor charges for cartage, boxing, storage, or insurance, nor auctioneer's charges for selling, nor for cataloguing goods, or for refunding purchaser's deposits on an adverse claim. *Ib.*
10. It seems that a claim for extra services or expenses upon special request may be allowed on taxation. *Ib.*
11. On execution, his poundage is limited to two and-a-half per cent. on two hundred and fifty dollars; and one-and-a-quarter per cent. on the excess over that sum. His charge for advertising sale is limited to two dollars, with one dollar additional if exe-

SHERIFFS.

cution be stayed after advertising and before sale. His fee for receiving and entering execution is fifty cents, and for return thirteen cents; and for travel, if not more than one mile, six cents. *Id.*

12. Where a transcript of a judgment, obtained in the marine court of the city of N. Y., was filed in the county clerk's office, it is to be deemed a judgment of the court of common pleas, and is to be enforced in the same manner as if it were [4 E. D. Smith, 227]; and the sheriff to whom execution upon it issues is restricted to the fees given him by statute. *Id.*
13. A sheriff, who has completed service of an execution, is entitled to poundage though the judgment and process be afterwards set aside, and also when he is prevented from fully executing the writ by the act of the party in whose favor it is granted; but where it is prevented by the act of the court before collection, *e. g.*, by the reduction of the judgment on appeals, the general provision of the statute, that the sheriff can only have commissions on the sum actually collected applies [reviewing authorities]. *Ct. of Appeals*, 1874, *Campbell v. Cothran*, 56 N. Y., 279; affirming 1 *Supreme Ct. (T. & C.)* 70; S. C., 65 *Barb.*, 534.
14. Fees on receipt and return of execution to be prepaid. *L.* 1875, p. 790, c. 680.
15. Service of process by leaving at his office. *Sherman v. Conner*, *Ante*, 396.
16. Power and duty to pay into court—*i. e.*, to the clerk—money collected on execution. *Ct. of Appeals*, 1874, *Nelson v. Kerr*, 59 N. Y., 224; affirming 2 *Supreme Ct. (T. & C.)* 299.
17. A sheriff to whom, after he has made a false return of "not found," the defendant on execution is surrendered by his bail, and who discharges the prisoner under *L.* 1869, c. 813, which requires discharge from civil process in Kings County unless the applicant for the arrest pays \$25 towards board, and thereby prevents the bail from securing an exoneration, can not set up the failure to procure an exoneration as a defense when sued by the bail for the false return. *Ct. of Appeals*, 1873, *Cozine v. Walter*, 55 N. Y., 304.
18. Where the sheriff has become liable to the defendant for a failure to justify by sureties in proceedings of claim and delivery, a surrender of the property by the sheriff to the defendant upon judgment in defendant's favor, affords no consideration for a promise on defendant's part to release the sheriff. Such a promise is no defense to the sheriff in a motion to enforce his liability under § 210 of the Code. *Ct. of Appeals*, 1874, *Hofheimer v. Campbell*, 59 N. Y., 269; affirming 7 *Lans.*, 157.

STATUTES.

SHIPPING.

4. The jurisdiction of state courts over an action by the sole injured party is not taken away by the act of congress of 1851, c. 43, as to the remedy in case of several parties injured to an extent beyond the value of ship and freight. *Ct. of Appeals*, 1874, *Dougan v. Champlain Transp. Co.*, 56 *N. Y.*, 1; affirming in effect as to jurisdiction, 6 *Lans.*, 430.
2. What contracts are maritime. *Poole v. Kermit*, 59 *N. Y.*, 554.

JURISDICTION.

SPECIFIC PERFORMANCE.

1. Requisite certainty of the contract. *Stanton v. Miller*, 58 *N. Y.*, 192.
2. Specific performance can not be decreed of a covenant by the lessor in a lease to repair damages caused by fire. *Ct. of Appeals*, 1874, *Beck v. Allison*, 56 *N. Y.*, 366; reversing 4 *Daly*, 421.
3. Though the later tendency of courts of equitable relief is to hold that time is material, and often the essence of the contract, still mere efflux of time will not of itself lead to a denial of equitable relief [reviewing the cases]. *Ct. of Appeals*, 1873, *Merchants Bank v. Thomson*, 55 *N. Y.*, 7; and see *Page v. McDonnell*, 55 *N. Y.*, 299.
4. In an action to charge the defendant as equitable mortgagee under a usurious conveyance, plaintiff can not have a judgment for specific performance on proof of an agreement to convey. *Ct. of Appeals*, 1873, *Fullerton v. McCurdy*, 55 *N. Y.*, 637.
5. In an action to cancel an executory contract, defendant set up a counter-claim for the specific performance of the contract as to part of the property, and a deduction of the price as to the residue which he persistently refused to accept. *Held*, that on appeal from a judgment in his favor, the court could not on his consent, and without consent of the plaintiff, adjudge a specific performance as to all the property. *Ct. of Appeals*, 1874, *Boyd v. Schlesinger*, 59 *N. Y.*, 301.

STATUTES.

1. Cases are to be determined upon the existing law, including statutes passed to cure defects in the mode of executing statute authority, although passed since the action was commenced. *Com. of Ap-*

SUMMARY PROCEEDINGS.

- peals*, 1874, *Town of Duaneburgh v. Jenkins*, 57 *N. Y.*, 177; reversing in effect, 46 *Barb.* 294.
2. Practice of the courts affords a proper rule of construction. *Ot. of Appeals*, 1874, *People v. Quigg*, 59 *N. Y.*, 83.

STAY OF PROCEEDINGS.

1. Appearance by town, when deemed unauthorized; and stay of proceedings therefor. *Town of Delhi v. Graham*, 3 *Hun*, 407.
2. Stay in divorce not granted merely because of former adjudication. *Dietz v. Dietz*, 2 *Hun*, 339.
3. Actions for recovery of public moneys by any other authority than the state, to be stayed when public sue. *L.* 1875, p. 44, c. 49, § 2.

SUBMISSION OF CONTROVERSY.

1. On the submission of a controversy without action, the court is confined to the facts agreed upon, and can make no inferences, nor in any way depart from or go beyond the statement presented. [46 *N. Y.*, 612.] *Ot. of Appeals*, 1874, *Fearing v. Irwin*, 55 *N. Y.*, 486.
2. An admission in such statement, although involving questions of law—as that on closing a highway the land will revert to one of the parties—may be regarded as a statement of a fact. *Ib.*
3. *It seems* that if the admission was improvidently made the injured party has his remedy by motion to strike out or amend. *Fearing v. Irwin*, 4 *Daly*, 385; and see 5 *Daly*, 383.

SUMMARY PROCEEDINGS.

1. 2 *R. S.*, 513, § 28, subd. 4,—as to dispossessing one who holds over after execution sale,—amended by extending it to foreclosure sale. *L.* 1874, p. 229, c. 208.
2. Further by including tenants farming on shares. *L.* 1874, p. 612, c. 471.
3. A lessor, holding a mortgage of the lease expressed to be subject to payment of rent, taking possession either as mortgagee or by summary proceedings under the statute, may foreclose the mortgage and sell the lease subject to the payment of rent; and the purchaser will come into the conventional relation of tenant, and may be dispossessed under the statute for non-payment of rent. *Ot. of Appeals*, 1874, *People (ex rel. Grissler) v. Dudley*, 58 *N. Y.*, 323; affirming 1 *Hun*, 102; *S. C.*, 3 *Supreme Ct. (T. & C.)* 179.

SUPREME COURT.

4. Where the heir and executor of a deceased lessor are in joint possession—*e.g.*, under a lease including property partly held in fee and partly in leasehold, they may maintain jointly a summary proceeding to dispossess, and the tenant of the whole can not require an apportionment to be first made. *Ib.*
5. Requisites of affidavit of service. People *ex rel.* Frost *v.* Marvin Safe Co., 5 *Hun*, 218.

SUMMONS.

The summons only serves to bring the party into court, and (when the cause is at issue and brought to trial) does not aid in the interpretation of the complaint. If the complaint does not follow the summons the remedy is by motion, not by asking a nonsuit. *Ct. of Appeals*, 1874, Graves *v.* Waite, 59 *N. Y.*, 156. There is a *mem.* of the decision below in 1 *Supreme Ct. (T. & O.) Adden.*, 16.

SUPERVISOR.

1. The provision of *L.* of 1866, ch. 534, § 1, amending 1 *R. S.* 349, § 5, authorizes proceedings either by mandamus or by action against a present or any former incumbent of the office who is delinquent. *Ct. of Appeals*, 1875, Town of Guilford *v.* Cooley, 58 *N. Y.*, 116.
2. In an action against a supervisor, under this statute, he can not set up as a counter-claim a claim against the town which he had presented to the board of audit, but which that board had not passed upon. *Ib.*

SUPPLEMENTARY PROCEEDINGS.

1. To authorize an order under § 297 of the Code of Procedure, the property to be applied to the payment of the judgment must belong to the judgment-debtor. If any other person claims an adverse interest in it the question must be settled by an action. *Com. of Appeals*, 1874, Barnard *v.* Kobbe, 54 *N. Y.*, 516.
2. There is no jurisdiction of proceedings to compel application of property of debtor who resides out of the officer's county. Driggs *v.* Smith, 47 *How. Pr.*, 215.

SUPREME COURT.

1. 1 *L.* 1870, p. 948, c. 408, § 3,—as to designation of general term justices,—amended by allowing substitution, on consent of the justice designated. *L.* 1875, p. 779, c. 616.

SURROGATE'S COURT.

2. The provision of § 24 of the Code of Pro., as amended by *L. 1862*, p. 846, c. 460, § 1,—allowing special terms to be adjourned to the chambers of the justice within the district,—does not authorize the transfer of local causes to another county from that where they are properly triable, nor is an error in this respect cured by re-adjourning the cause after trial partly had. *Ot. of Appeals*, 1874, Gould v. Bennett, 59 *N. Y.*, 124; *S. C.*, 49 *How. Pr.*, 57.

SURROGATE'S COURT.

1. 1 *L. 1870*, p. 157, c. 74, § 2,—empowering surrogates to sign unfinished records, &c.,—amended by extending it to records of letters testamentary of administration and guardianship, and giving the signature the like effect as if the predecessor had signed. *L. 1874*, p. 7, c. 9.
2. Clerk has power to take and certify affidavits, oaths, and acknowledgments to any paper authorized or required in any proceeding in the court, to administer oaths and affirmations in all matters pending before the surrogate, and to adjourn any matter in the surrogate's absence, sickness, or inability, but not more than thirty days at any one time. *L. 1874*, p. 602, c. 456.
3. Construction of statutes as to jurisdiction. *Hartnett v. Wandell*, *Ante*, 383.
4. Surrogate may allow proceeding for probate to be withdrawn. *Heermans v. Hill*, 2 *Hun*, 409.
5. May appoint guardian for infant wife. *Matter of Herbeck*, *Ante*, 214.
6. May pass on disputed claim of executor, &c. *Matter of Flood*, *Ante*, 407.
7. The revocation of letters of administration does not oust the surrogate's jurisdiction of proceedings already instituted by the administrator for a final accounting, or prevent him from proceeding to a final decree. *Ot. of Appeals*, 1874, *Casoni v. Jerome*, 58 *N. Y.*, 315.
8. *It seems* proper that a new administrator be appointed before continuing the proceedings. *Ib.*
9. *L. 1873*, p. 863, c. 552, § 2—requiring affidavit on probate of heirship, &c., to be recorded in county clerk's office—amended by substituting register's office in those counties where such office exists. *L. 1874*, p. 148, c. 127.
10. Surrogate will not take accounting of trustee under a *deed*. *Brown's Accounting*, *Ante*, 457.
11. Power to grant re-hearing after accounting. *Wright's Accounting*, *Ante*, 429.
12. Costs in supreme court on appeal. *Dupuy v. Wurts*, 47 *How. Pr.*, 225.

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1. The issue on the trial of title to corporate office is one which a party is, under the constitution, entitled to have submitted to a jury, and if, with such a suit, other causes of action, equitable in their nature, are joined, all must be tried by a jury, unless a jury trial is waived. *Com. of Appeals*, 1874, *People v. Albany & Susquehanna R. R. Co.*, 57 *N. Y.*, 161; reversing in part, and affirming in part, 5 *Lans.*, 25.
2. Where upon the trial in such case, plaintiffs rested after reading their pleadings, *held*, that it was not too late for defendants to insist upon their right to a trial by jury. *Ib.*
3. A party can not be deprived of his constitutional right to a jury trial, by a mere technicality. *Ib.*
4. Under the Code, the court may order any cause to be tried by jury; but having done so it can not, after verdict for damages, proceed to determine additional facts on which to found judgment for specific relief. Under such an order the verdict must determine all the material issues. *Ct. of Appeals*, 1874, *Parker v. Laney*, 58 *N. Y.*, 469; reversing 1 *Supreme Court (T. & C.)* 590.
5. In an action for damages caused by nuisance, and to restrain such nuisance, defendant demanded and obtained a trial by jury. Plaintiff had a verdict for twenty-five dollars damages. The court, upon the evidence given before the jury, found the facts relating to the equitable questions in the case, and ordered judgment for a perpetual injunction, and for the twenty-five dollars damages. *Held*, that although the finding of further facts by the court was irregular, the judgment entered might be sustained, because the verdict necessarily established the right to relief against the nuisance. *Ib.*
6. Express consent waives mis-trial. *Byrnes v. City of Cohoes*, 5 *Hun*, 602.
7. After a trial of an equity action, and its submission to the court, the court may, while it remains under advisement, order particular issues to be tried by a jury. *Ct. of Appeals*, 1874, *Brinkley v. Brinkley*, 56 *N. Y.*, 192; affirming in effect, 2 *Supreme Ct. (T. & C.)* 501, where the authorities are reviewed.
8. Section 267 of the Code, requiring a decision within a specified time, does not apply to such a case, since the qualification, if no other disposition is made of the case, is necessarily implied. *Ib.*
9. Practice as to special issues for jury in partition under act of 1853-*Hewlett v. Wood*, 3 *Hun*, 736.

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10. An order dismissing the complaint can not be properly made upon the trial, before a jury, of issues settled in an equity action. Verdict must be taken, and the counsel then heard by the court. So held where the dismissal was as to one of several defendants, on the ground of a failure of proof. *Ct. of Appeals*, 1873, *Moore v. Metropolitan Nat. Bank*, 55 *N. Y.*, 41.
11. Statute authorizing circuit court and oyer and terminer to summon additional jurors, extended to county courts and courts of sessions. *L.* 1874, p. 75, c. 52.
12. Summoning talesmen. *Shields v. Niagara Savings Bank*, 3 *Hun*, 477.
13. The objection that facts proved are not available, because not pleaded, must be taken at the trial. [12 *N. Y.*, 18.] *Ct. of Appeals*, 1873, *Gray v. Barton*, 55 *N. Y.*, 68; *Voorhees v. Burchard*, 55 *Id.*, 98; affirming 6 *Lans.*, 176.
14. The court may, in their discretion, at the end equally with the beginning of the trial, compel a defendant to elect between two incongruous defenses in his answer. *Ct. of Appeals*, 1874, *Southworth v. Bennett*, 58 *N. Y.*, 659.
15. Judgment may be awarded on proof of the material or issuable allegations of the complaint, although the summons is in the wrong form. *Ct. of Appeals*, 1874, *Graves v. Waite*, 59 *N. Y.*, 156. There is a *mem.* of the decision below in 1 *Supreme Ct. (T. & C.)*, *Adden.*, 16.
16. What deficiencies in pleading, not available at the trial. *Lathrop v. Godfrey*, 3 *Hun*, 739.
17. In an action for trespass on lands, the complaint alleged that the plaintiff then, and for a long time previous, had been owner in fee and possessed of the land in dispute; and the answer did not deny the possession, but set up title in defendant—*held*, that defendant had the affirmative to defeat plaintiff's title. *Com. of Appeals*, 1873, *Wheeler v. Spinola*, 54 *N. Y.*, 377.
18. Right to open and close in insurance case. *Hunter v. Am. Popular Life Ins. Co.*, 4 *Hun*, 794.
19. In action on note. *Morss v. Gleason*, 2 *Hun*, 31.
20. The objection that a witness, called to contradict statements of a witness of the other party, had his attention directed to a different time than the witness sought to be impeached, can not be taken for the first time on appeal. *Ct. of Appeals*, 1874, *Schermerhorn v. Gregg*, 55 *N. Y.*, 670.
21. So of the objection that facts proven were not pleaded. *Voorhees v. Burchard*, 55 *N. Y.*, 98.
22. Objection to the admission of books of parties in evidence should

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- specify the grounds of the objection, to be available on appeal, as such books are sometimes admissible. *Com. of Appeals*, 1874, Wall v. Ellis, 54 N. Y., 684.
23. Where a letter is offered for the purpose of proving a notice contained in it, a general objection is not sufficient, but the inadmissible part must be objected to. *Com. of Appeals*, Stokes v. Johnson, 57 N. Y., 673.
24. A mere objection that there was no sufficient evidence of certain facts on which a judge's order was based, without specifying defects, is not sufficient to exclude the order, if there was some evidence. *Com. of Appeals*, 1873, Chapman v. Gates, 54 N. Y., 132.
25. A question whether the witness recollected whether a third person made certain declarations, is not to be excluded merely because the declarations would not be competent. *Ct. of Appeals*, 1874, Roberts v. Johnson, 58 N. Y., 613; affirming 37 N. Y. Superior Ct. (5 J. & S.) 157.
26. In an action in which the plaintiff relies on an oral transaction, if defendant proves a written contract varying therefrom, it is error to refuse a motion to strike out the evidence of the inconsistent oral arrangement. *Ct. of Appeals*, 1874, Hinckley v. N. Y. Central & Hudson River R. R. Co., 56 N. Y., 429.
27. The admission of parol evidence to vary the terms of a written contract, without objection at the time, does not render it competent evidence, and upon subsequent objection it may be excluded by the referee. *Com. of Appeals*, 1873, Armstrong v. Ferguson, 54 N. Y., 659.
28. In malicious prosecution, the prosecution complained of being an arrest for assault, if defendant has given evidence that plaintiff was the aggressor, the defendant may show the nature of the difficulty and plaintiff's threats [42 How. Pr., 41; 63 Barb., 73; 21 N. Y., 27; 53 Id., 164]; but if merely offered generally, and without having given evidence that plaintiff was the aggressor, the court has a discretion to exclude it as only affecting the credit of the witness. [6 N. Y., 97; 32 Id., 127.] *Com. of Appeals*, 1874, Carpenter v. Halsey, 57 N. Y., 657; affirming, *it seems*, 60 Barb., 45.
29. Distinction between testimony to fact and to legal conclusion. Sanborn v. Lefferts. *Ante*, 42.
30. Power of court to close immaterial cross-examination, reiterated. McGuire v. People, 48 How. Pr., 517.
31. A request to the court upon the whole case to direct a verdict for the defendant, is, in substance and effect, a motion for a nonsuit. *Com. of Appeals*, 1873, Appleby v. Astor Fire Ins. Co., 54 N. Y., 253.
32. Though the judge at the close of plaintiff's case refuse defen-

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- dant's motion for a nonsuit, he may, even after defendant has submitted evidence, reconsider his decision and dismiss the complaint. *Com. of Appeals*, 1873, *Fitch v. Hassler*, 54 *N. Y.*, 677.
33. In an action for fraud in two distinct transactions, alleged by two separate counts, where plaintiff is nonsuited at the close of his evidence as to one count, he can not have the evidence given in support of such count (even as to cotemporaneous acts) considered in deciding the merits of the other, at least without allowing defendant, though he had rested, to rebut it. *Com. of Appeals*, 1873, *Meyer v. Cullen*, 54 *N. Y.*, 392.
34. It is not necessary for defendant to move to strike out such evidence, in order to secure its exclusion from the summing up by plaintiff's counsel. *Ib.*
35. Upon undisputed facts the court may render the judgment the law requires without the aid of a jury. *Com. of Appeals*, 1873, *Appleby v. Astor Fire Ins. Co.*, 54 *N. Y.*, 253.
36. This principle applied to the construction of acts of the insured under a fire policy. *Ib.*
37. Where plaintiff's counsel, on summing up, was permitted, against objection, to read to the jury a pamphlet proved to have been issued by defendant, but not admitted in evidence,—*held*, error. *Com. of Appeals*, 1874, *Koelges v. Guardian Life Ins. Co.*, 57 *N. Y.*, 638.
38. An expression of opinion by the court on matter of fact, *e. g.*, the credibility of a witness, must be advisory merely, and not put in the form of a direction as matter of law; if it be thus absolute, an exception lies. [21 *Wend.*, 509.] *Ct. of Appeals*, 1874, *Allis v. Leonard*, 58 *N. Y.*, 288.
39. It is not error for the court to refuse to charge that if the jury believe certain specified witnesses, they should find for the party for whom they testified. The facts upon which the instruction is asked should be hypothetically stated, and left to the jury to decide from the evidence. *Ct. of Appeals*, 1874, *Chapman v. Erie Railway Co.*, 55 *N. Y.*, 579; reversing 1 *Supreme Ct. (T. & C.)* 526.
40. Proper terms of charge in reference to rejecting credit of impeached witness. *Ct. of Appeals*, 1874, *Allis v. Leonard*, 58 *N. Y.*, 288; *White v. McLean*, 57 *N. Y.*, 670; *S. C.*, fully reported, 47 *How. Pr.*, 193.
41. Instructing the jury that "in this class of cases" exemplary damages may be given, when they can only be given in exceptional cases of the class, is error. *Ct. of Appeals*, 1874, *Cleghorn v. N. Y. Central & H. River R. R. Co.*, 56 *N. Y.*, 44.
42. After properly charging that the verdict should be one way or

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- the other according as the jury believed the testimony (in an action for possession of personal property), *held*, that a refusal to charge that plaintiff, to obtain a verdict, must satisfy the jury to a "moral certainty," was not error. *Com. of Appeals*, 1874, *Johnston v. Bush*, 57 *N. Y.*, 633.
43. To obviate an erroneous instruction to the jury on a material point, it must be withdrawn in such explicit terms as to preclude the inference that the jury might have been influenced by it. *Ct. of Appeals*, 1874, *Chapman v. Erie Railway Co.*, 55 *N. Y.*, 579; reversing 1 *Supreme Ct. (T. & C.)* 526.
44. When the jury have been properly instructed upon every question material to the disposition of the cause, the judge may decline to entertain any further application from either party to instruct them. *Com. of Appeals*, 1873, *Moody v. Osgood*, 54 *N. Y.*, 488.
45. Refusal to charge upon an irrelevant point, or to repeat an instruction, is not error. *Kissenger v. N. Y. & Harlem R. R. Co.*, 56 *N. Y.*, 538.
46. Terms of proper charge in reference to duty of railroad corporation to use best appliances. *Crist v. Erie Railway Co.*, 58 *N. Y.*, 638.
47. Charging in language leaving a question of waiver to the jury, where there was no evidence of waiver, *held*, error. *Ct. of Appeals*, 1874, *Palmer v. Kelly*, 56 *N. Y.*, 637; reversing 36 *N. Y. Superior Ct. (4 J. & S.)* 571.
48. It is error for a judge to submit a question to the jury where there is no evidence to authorize any finding thereon, and it is, for a similar reason, correct to refuse to submit a question unsupported by evidence. [1 *Den.* 583.] *Com. of Appeals*, 1873, *Algur v. Gardner*, 54 *N. Y.*, 360.
49. To authorize the submission of a question of fact to the jury, it is not enough that there was a mere scintilla of evidence. So held in a case of negligence. *Ct. of Appeals*, 1874, *Baulec v. N. Y. & Harlem R. R. Co.*, 59 *N. Y.*, 356; *S. C.*, 48 *How Pr.*, 399; affirming in effect, 12 *Abb. Pr.*, *N. S.*, 310; 5 *Lans.*, 436; 62 *Barb.*, 623.
50. Refusal to direct a verdict is not error where, though the evidence be uncontradictory, conflicting inferences may be drawn therefrom, or where conflicting constructions may fairly be given to the language proved. The facts, not simply the evidence, must be undisputed to make the question one of law. *Ct. of Appeals*, 1874, *Smith v. Coe*, 55 *N. Y.*, 678.
51. If a party is surprised by evidence, he should ask to withdraw a juror, so that the cause may stand over. If he goes on and asks a verdict, he can not afterward ask a new trial on the ground of sur-

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- prise. *N. Y. Com. Pl. (Sp. T.)*, 1875, *Messenger v. Fourth Nat. Bank*, 48 *How. Pr.*, 542.
52. Practice in submission of special questions to jury. *Zimmerman v. Schoenfeldt*, 3 *Hun*, 692.
53. Where plaintiffs plead joint claims, and no issue is taken on the point, and on the trial, plaintiffs prove one of the claims to be a separate one,—a joint recovery is proper, for plaintiffs are estopped and defendants not prejudiced. *Quinn v. Martin*, 54 *N. Y.*, 660.
54. A general verdict can not be taken to contradict a special finding by the jury, where the charge of the judge did not strictly involve such contradiction. *Ot. of Appeals*, 1874, *Collins v. Hasbrouck*, 56 *N. Y.*, 157; reversing 1 *Supreme Ct. (T. & C.)* 36.
55. Drawing jurors for oyer and terminer. *Powell v. People*, 5 *Hun*, 169.
56. Under 2 *R. S.* 411, § 13—defining the property qualification of jurors,—a challenge lies if a juror lacks the property qualification at the time of trial. Section 33, allowing a discharge in certain cases, contemplates the juror's application, and does not diminish the right of challenge, which is a strictly legal right. *Ot. of Appeals*, 1874, *Kelley v. People*, 55 *N. Y.*, 565; affirming *Armsby v. People*, 2 *N. Y. Supreme Ct. (T. & C.)* 157.
57. Election between courts. *People v. Satterlee*, 5 *Hun*, 167.
58. A person prosecuted for an offense before a court-martial organized under the laws of this state, can demand, as a constitutional right, that he be allowed to defend with counsel. *Ot. of Appeals*, 1873, *People ex rel. Garling v. Van Allen*, 55 *N. Y.*, 31.
59. Paragraph 189 of the General Regulations for the military forces of the state, in attempting to restrict such right, is unconstitutional and void, as in conflict with § 6, Art. 1, of the state constitution, securing the right to have counsel. *Ib.*
60. The calling out of evidence for one purpose, which, though innocent, is unnecessary, and using for another purpose which is illegal, is improper; and if it is clear that the avowed purpose is colorable merely, its admission is error. *Ot. of Appeals*, 1873, *Coleman v. People*, 55 *N. Y.*, 81; reversing 1 *Supreme Ct. (T. & C.)*, *Adden.*, 3.
61. If a prisoner, on trial for one offense, does call out facts upon cross-examination tending to show that he is not guilty of another offense, this does not justify evidence on the part of the prosecution to prove that he is guilty of the other offense. *Ib.*
62. After a full and fair charge on the evidence, it is not matter of right for the prisoner to ask instructions on a hypothetical case. *Ot. of Appeals*, 1874, *Slatterly v. People*, 58 *N. Y.*, 354; affirming 3 *Supreme Ct. (T. & C.)* 669.

VARIANCE.

63. A charge that there was a presumption of guilt, when the presumption was only one of fact for the jury,—*held*, not erroneous, especially where a subsequent part of the charge corrected the rule. *Ct. of Appeals*, 1874, *Stover v. People*, 56 *N. Y.*, 315.
64. Verdict and effect of conviction in prosecution for peculation of public moneys. *L.* 1875, p. 20, c. 19, § 3.

TRUSTS.

1. Trustee responsible for all subordinates. *Brown's Accounting, Ante*, 457.
2. Liability of trustee for services. *Davis v. Stover, Ante*, 225.
3. The court have power (inherent, and apart from the statute), upon a petition, to appoint a trustee, as well where there is a remaining co-trustee who fails to execute a power to appoint as where the trusteeship is entirely vacant. *Supreme Ct. (Sp. T.)*, 1874, *Bronson v. Bronson*, 48 *How. Pr.*, 481.
4. Where one sues in equity to protect his alleged legal title as against the *cestui que trust*, the court may, on proof that he is really a trustee, declare his title subject to the trust, and since the Code, may, in the same action, restrain the trustee from asserting any further claim in violation of his trust. *Ct. of Appeals*, 1874, *Blake v. Buffalo Creek R. R. Co.*, 56 *N. Y.*, 485.

VARIANCE.

1. Where the complaint alleged false representations by defendant in assuming to be agent of a third person, and procuring sale and delivery of chattels by plaintiff in his behalf, and the proof showed due agency, but that the purchase-money had been retained by the defendant—*held*, that the complaint must be dismissed. To allow recovery would be to change from tort to contract. *Com. of Appeals*, 1873, *Bernhard v. Seligman*, 54 *N. Y.*, 661.
2. Allegation of contract to pay a specific sum for services, proof merely of quantum meruit—*held*, a variance properly disregarded. *Ct. of Appeals*, 1873, *Sussdorff v. Schmidt*, 55 *N. Y.*, 319.
3. Allegation that plaintiff's book-keeper supposed checks had been duly dishonored, &c., proof that he supposed they were covered by an agreement which dispensed with protest, *held*, not material. *Ct. of Appeals*, 1874, *Walbridge v. Ocean Nat. Bank*, 59 *N. Y.*, 642.

WITNESSES.

VENUE.

Grounds of changing, for impartial trial. *People v. Sammis*, 3 *Hun*, 560.

VILLAGES.

Several taxes can not be united in one resolution. *North Tonawanda v. Western Transp. Co.*, *Ante*, 297.

WILLS.

1. Delegated power to appoint co-executor, valid. *Hartnett v. Wandell*, *Ante*, 383.
2. Testamentary capacity of believer in transmigration of souls; clauses of revocation; direction to invest in land rejected; what works conversion; incorporation after testator's death, can not enable to take. *Bonard's Will*, *Ante*, 128.
3. Of a wife's right to appear in probate proceedings without her husband. *Matter of Rollwagen*, 48 *How. Pr.*, 103.
4. Substitution of parties to probate on death of contestant. *Van Alen v. Hewins*, 5 *Hun*, 44.
5. Examination of medical expert. *Bonard's Will*, *Ante*, 128.
6. It is only when a court of equity is moved on behalf of an executor trustee, or *cestui que trust*, and to ensure the correct administration of the power conferred by a will, that it has jurisdiction to give a construction to a doubtful or disputed clause in a will, such jurisdiction being incidental to that over trusts only. *Ct. of Appeals*, 1874, *Bailey v. Briggs*, 56 *N. Y.*, 407.
7. As to who may sue for construction, see also *Chipman v. Montgomery*, 4 *Hun*, 739.

WITNESSES.

1. Ignorance, &c., no excuse for refusal. *Morgan v. Morgan*, *Ante*, 291.
2. A subpœna *duces tecum* can not be allowed against a party on his examination before trial, under §§ 390, 391 of the Code. The remedy is a discovery under the Revised Statutes. *N. Y. Com. Pl.*, 1874, *De Bary v. Stanley*, 48 *How. Pr.*, 349.
3. Subpœna *duces tecum* can not bring up corporate books. *Morgan v. Morgan*, *Ante*, 291.

WITNESSES.

4. *L.* 1873, p. 1249, § 3—giving coroner mileage when a witness—amended by limiting it to criminal cases. *L.* 1874, p. 724, c. 535, § 3.
5. Communications between attorney and client in reference to any matter the proper subject of professional employment.—*e. g.*, the drawing of a mortgage,—are privileged. [45 *N. Y.*, 47.] *Ct. of Appeals*, 1874, *Yates v. Olmsted*, 56 *N. Y.*, 632; reversing 65 *Barb.*, 43, 462.
6. What passes between attorney or counsel and client is not incompetent, if it can be proved without violating the immunity from examination which attaches to the attorney or counsel. A third person may testify to what a party said to his counsel as well as to his declarations to any other person. *Ct. of Appeals*, 1874, *Carey v. White*, 59 *N. Y.*, 336.
7. In what cases a judge or juror may also testify as a witness. *People v. Dohring*, 59 *N. Y.*, 374; overruling 2 *Supreme Ct. (T. & C.)* 458.
8. The Code only allows the compulsory examination of adverse parties as a substitute for the former discovery by bill, and § 401, sub. 7, does not sanction compelling a party to an action to make an affidavit to be used on a motion. [Code of Pro., § 389]. *Ct. of Appeals*, 1874, *King v. Leighton*, 58 *N. Y.*, 383.
9. Nor does section 271, subd. 3, nor section 288 of the Code, or the provisions of the Revised Statutes in relation thereto, authorize the examination of a party upon a reference for a discovery of books and papers. *Ib.*
10. The general examination of a party, as a witness in the cause, can only be had on behalf of an adverse party in the manner prescribed by sections 390–397 of the Code. *Ib.*
11. Section 399 applies to party called for co-party. *Bennett v. Austin*, 5 *Hun*, 536.
12. Exclusion under section 399 does not depend on whether witness's interest was the subject of transaction. *Farnsworth v. Ebbs*, 2 *Hun*, 438.
13. Section 399 of the Code does not preclude a witness from testifying to what took place between the deceased and a third person, who was the counsel of the deceased, even though the witness participated in the conversation, if what is proposed to be proved is limited to what was neither a personal transaction nor a communication between the witness and the deceased. *Ct. of Appeals*, 1874, *Cary v. White*, 59 *N. Y.*, 336.
14. To make section 399 of the Code applicable, the party deemed an assignee, &c., must stand in succession in interest to the deceased.

WITNESSES

When his interest is not one at that time held by the deceased, and subsequently devolved on such party, but was one vested in him by a title superior to and exclusive of the deceased at the time of the transaction, the rule of exclusion does not apply. One who claims under a transfer previous to the transaction or communication, is not an assignee within the statute. *Id.*

15. Section 399 of the Code does not apply to exclude the testimony of a married woman in a case turning on her assignment procured by her husband, since deceased, of a policy of insurance of his life. *Ct. of Appeals*, 1875, *Barry v. Equitable Life Ass. Soc. of U. S.*, 59 *N. Y.*, 587; affirming 14 *Abb. Pr.*, *N. S.*, 385, *n.*
16. Signing a document, held a transaction within section 399. *Denman v. Jayne*, *Ante*, 317.
17. Competency of widow to prove marriage. *Spicer v. Spicer*, *Ante*, 112.
18. Where deceased's verbal declarations are admitted, his written counter declarations are competent. *Smith v. Christopher*, *Ante*, 332.
19. The statute (*L.* 1847, c. 460, § 150),—allowing convict to be examined as a witness against fellow-prisoners for offenses actually committed in prison,—does not restrict the testimony to the particular acts constituting the crime, but permits testimony of any fact material to the issue, such as subsequent declarations of the accused. *Ct. of Appeals*, 1874, *Donohue v. People*, 56 *N. Y.*, 208.
20. A witness who has seen a person write his name once, or who has never seen him write, but has held his note, acknowledged to be genuine, is competent to testify to his signature. *Com. of Appeals*, 1873, *Hammond v. Varian*, 54 *N. Y.*, 398.
21. Witness must state facts, not his own mental conclusions. *Nichols v. Kingdom Iron Ore Co.*, 56 *N. Y.*, 618.
22. The question, "State on whose credit the cattle were bought"—put to defendant, sued for the price of the cattle bought by him, as a witness, in his own behalf—*held*, incompetent, as calling for witness's conclusion, but the objection to the admission of the answer having been general, no ground of objection having been stated, exception thereto is not available on appeal. *Com. of Appeals*, 1874, *Merritt v. Briggs*, 57 *N. Y.*, 651.
23. Witness not disregarded on all points merely because false in one. *Koehucke v. Ross*, *Ante*, 345.
24. Not examinable to explain his written declarations not put in evidence. *Hotchkiss v. Germania Fire Ins. Co.*, 5 *Hun*, 90.
25. Hostile declarations at remote time. *Id.*

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26. Impeaching by written declaration. *Honstine v. O'Donnell*, 5 *Hun.*, 472.
27. Where a writing of the witness is shown to him, upon objection that he can not be cross-examined as to it without, an exception to his being asked the contents instead of the affidavit being read, must clearly show the ground. *Com. of Appeals*, 1873, *Chester v. Dickerson*, 54 *N. Y.*, 1; *S. C.*, 45 *How. Pr.*, 326; affirming 52 *Barb.*, 349.
28. A party may prove a material fact to the contrary of testimony brought out by his cross-examination of a witness of the adversary. *Ct. of Appeals*, 1874, *Newberry v. Furnival*, 56 *N. Y.*, 638; affirming 46 *How. Pr.*, 139.
29. A party may contradict his own witness as to a fact material to a cause, although the fact may be to discredit him; but he can not adduce such a contradiction when it is only material as it bears upon his credibility. Thus, if a witness has testified to a fact and to certain subsequent declarations by himself, the party may disprove the fact, but can not disprove the declarations. [5 *Den.*, 112; 4 *N. Y.*, 303.] *Ct. of Appeals*, 1874, *Coulter v. Am. Merchants' Union Express Co.*, 56 *N. Y.*, 585; reversing 5 *Lans.*, 67.
30. Evidence by a witness called by the plaintiff, given on cross-examination, as new matter of statements made by him as a witness in a previous cause,—*held*, not to conclude defendant from disputing the evidence. *Ct. of Appeals*, 1874, *Smith v. Hart*, 58 *N. Y.*, 644.
31. While a party may not impeach, either by general evidence or by proof of contradictory statements out of court, a witness whom he has called, he may contradict him as to a fact material in the cause, though the effect of such contradiction may be to discredit him, but (if surprise is not shown) he can not adduce such a contradiction when it is only material as it bears on the credibility of the witness, even though the declaration related to a material fact. *Ct. of Appeals*, 1874, *Coulter v. Am. Merchants' Union Express Co.*, 56 *N. Y.*, 585.
32. It is within the discretion of the court to require a party, sworn in his own behalf on an issue of usury, to answer whether he is not under indictment for usury. *Ct. of Appeals*, 1874, *Southworth v. Bennett*, 58 *N. Y.*, 659.
33. Cross-examination to prove extra-judicial statements more favorable than testimony, not competent. *Hotchkiss v. Germania Fire Ins. Co.*, 5 *Hun.*, 90.
34. The judge at the trial has discretionary power to control the cross-examination, stopping it on a particular point, by directing

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- the witness to leave the stand,—*held*, not error under the circumstances. [32 N. Y., 127; 33 Id., 250.] *Com. of Appeals*, 1874, *White v. McLean*, 47 *How. Pr.*, 193; S. C., 57 N. Y., 670.
35. Right to examine for the purpose of corroborating or explaining mistakes. *People ex rel. Stemmler v. McGuire*, 2 *Hun*, 269.
36. Examination of medical expert. *Bonard's Will*, *Ante*, 128.
37. The rule that a witness may testify to entries made by him in a day-book, swearing he sold the goods charged, and made the charge, though unable to state the details save from the entries [15 N. Y., 488; 17 Id., 134; 22 Id., 465; 29 Id., 351], applies although the entries were only of each order in gross without stating the items. *Com. of Appeals*, 1874, *Gilbert v. Sage*, 57 N. Y., 639; affirming 5 *Lans.*, 287.
38. What paper may be used to refresh memory. *Honstine v. O'Donnell*, 5 *Hun*, 472. Compare 38 *Superior Ct.* (6 J. & S.) 281.



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